2013

Jurisdictional Standards (and Rules)

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ABSTRACT

This Article uses the jurisprudential dichotomy between two opposing types of legal requirements—"rules" and "standards"—to examine extraterritorial regulation by the United States. It argues that there is natural push toward standards in extraterritorial regulation because numerous institutional actors either see standards as the best option in extraterritorial regulation or accept standards as a second-best option when their first choice (a rule favorable to their interests or their worldview) is not feasible.

The Article explores several reasons for this push toward standards, including: statutory text, statutory interpretation theories, the nonbinary nature of the domestic/foreign characterization, the tendency of extraterritorial regulation to favor plaintiffs, interest-group pressures, and interbranch struggles within the federal government.

Since it appears standards are here to stay, this Article concludes by suggesting that they may have some underappreciated benefits, at least from the perspective of a regulating state. First, the uncertainty inherent in standards may be a necessary consequence of regulatory schemes permitting private civil litigants to enforce extraterritorial statutes. Second, this inherent uncertainty may permit a state's regulatory program to influence primary behavior abroad that would be difficult to reach through a rule-based model.

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I. INTRODUCTION

Extraterritorial regulation, once an esoteric topic, is now a basic fact of the international business environment. A company may be incorporated in one country, listed on a stock exchange in a second country, have offices in numerous other countries, and sell products throughout much of the world. Each country with which the company has a connection will likely seek to regulate some of the company's activities within that country. However, many countries find that they cannot reach in-country activities (such as sale of dangerous products or monopoly pricing) without regulating out-of-country activities (such as manufacturing processes or agreements to collude) as well.[1]

Moreover, countries are almost never adequately conceptualized as single institutional actors.[2] Within a single country, different institutional actors are likely to have different preferences with respect to the scope of extraterritorial regulation.[3] To the extent different structures of legal requirements give discretionary authority to different institutional actors, they can affect the allocation of foreign-policy decision making within a country.

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1. The United States is widely acknowledged to be an aggressive extraterritorial regulator. While much opposition to U.S. extraterritorial regulation has come from European countries, the European Union is now itself an important extraterritorial regulator. China is even beginning to exercise extraterritorial authority, though it may be hampered by a domestic regulator system that is currently far less developed than those of the United States and Europe.

2. Even countries widely considered autocratic often have formal institutional separations, and dictators—like everyone else—must contend with principal–agent problems.

3. They may have different preferences both as to the scope of extraterritorial regulation generally and the degree of extraterritorial regulation appropriate in different substantive fields.

The United States has long been an aggressive extraterritorial regulator. Some federal laws provide explicit extraterritorial authority; others have been interpreted by courts to apply outside the United States. Many statutes permit the U.S. government to bring extraterritorial enforcement action; a smaller but still significant number also give private parties the ability to enforce extraterritorial statutes through civil suits.[4]

Despite the importance of extraterritorial regulation to the modern states, doctrinal accounts have proved highly unsatisfactory in either explaining existing jurisprudence or predicting future decisions. This Article puts traditional doctrinal tools to the side and looks instead at the underlying structure of the legal framework that has developed around extraterritorial regulation. The Article focuses on one aspect of this underlying structure that has not been explored in existing literature—the degree to which the territorial scope of a legal requirement is structured as a "rule" or a "standard."[5]

The rule/standard distinction serves as a wider lens for viewing existing case law. From this perspective, existing doctrine looks less like a confused jumble of inconsistent decisions.[6] Instead, it begins to look more like the doctrinal consequences of a larger battle over the form of legal requirements and the allocation of decision-making authority within a multibranch government.[7]

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4. *See infra* Part VI.D.

5. For a detailed explanation of the difference between rules and standards, see *infra* Part II.A.

6. This is not to suggest these inconsistent decisions are inherently problematic—they may to some extent be a necessary result of the Supreme Court's institutional structure. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 831 (1982) (concluding, based on Arrow's Impossibility Theorem, that the Supreme Court is institutionally incapable of avoiding logically inconsistent decisions).

7. For examples of Supreme Court cases treating the territorial scope of federal law as a standard, see F. Hoffman-LaRoche Ltd. v. Empagran, S.A., 542 U.S. 155, 173 (2004) (relying on comity and historical context to conclude that Congress did not intend for the Foreign Trade Antitrust Improvement Act of 1982 to include foreign injury—that was independent of any domestic injury—within the scope of the Sherman Act); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–99 (1993) (concluding that conflict between U.S. and British insurance law was not sufficient to justify the exercise of comity-based abstention on the particular facts); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 384 (1959) (balancing interests to conclude that the Jones Act did not apply to a claim by a Spanish subject against a Spanish corporation for an injury in U.S. territorial waters); Lauritzen v. Larsen, 345 U.S. 571, 592 (1953) (applying Danish law, instead of the Jones Act, after reviewing a long list of factors and concluding that they weighed heavily in favor of Danish rather than U.S. law). Sometimes these standards are phrased in the form of rules, but the presence of longstanding, unresolved conflicts between nonoverruled cases in effect transforms rules into standards. *See* Cass Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 965 (1995) (explaining that a standard exists when you cannot know in advance how it will be applied to particular facts).

This Article has four primary goals. First, it suggests that the rule/standard distinction provides a way of understanding the manner in which the territorial scope of statutes is structured. Second, it suggests that the statutory-interpretation battles that dominate existing doctrine are relevant only for one type of statute—those whose territorial scope is structured as a standard rather than a rule. Third, it suggests that different institutional actors will have different preferences with respect to whether the territorial scope of a statute is set out as a rule or a standard. Fourth, it suggests that the uncertainty inherent in standards may have some underappreciated benefits.

The argument proceeds as follows. Part II provides an overview of the jurisprudential concepts of rules and standards. Part III introduces three broad statutory categories: (1) extraterritorial rules, such as the Foreign Corrupt Practices Act (FCPA), in which there is a clear statement of extraterritorial reach; (2) territorially limited rules, in which there is a clear statement against extraterritoriality; and (3) potentially extraterritorial standards, in which extraterritorial reach is uncertain. The third category, potentially extraterritorial standards, accounts for much of the current doctrinal confusion. Part IV explains that one way of making sense of this confusion is to understand potentially extraterritorial standards as being subject to three types of interpretive approaches: (1) proextraterritoriality interpretive methods, (2) antiextraterritoriality interpretive methods, and (3) territorially neutral interpretive methods.[8] Part V suggests that leading extraterritoriality precedents make more sense when viewed as a struggle between rules and standards, on the one hand, and proextraterritoriality and antiextraterritoriality interpretive methods, on the other hand. Part VI addresses the stability of interpretive methods over time and the uncertainty created by standards. It suggests that differences in interest-group pressure may make antiextraterritoriality interpretive methods more stable than proextraterritoriality interpretive methods. It further suggests that the uncertainty inherent in standards-based

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For examples of the Supreme Court treating the territorial scope of federal law as a rule, see EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258–59 (1991) (purporting to apply the clear statement rule to conclude that Title VII did not apply to a U.S. citizen employed by a U.S. company in Saudi Arabia); Foley Bros. v. Filardo, 336 U.S. 281, 285, 290–91 (1949) (declining to apply the Eight Hour Law to work done by a U.S. citizen for a U.S. government contractor in Iran and Iraq, and basing the decision on formal differences in territorial control between U.S. possessions and foreign countries); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 389–90 (1948) (applying the Fair Labor Standards Act to an area of Bermuda leased, for ninety-nine years, from Great Britain by the United States).

8. I use the phrase "interpretive methods" rather than "canons" here because some of the relevant interpretive methods are general approaches to statutory interpretation for which the term *canon* seems too narrow.

regulation may have advantages in the extraterritoriality context, at least from the perspective of an individual state. Part VII concludes.

II. "RULES" AND "STANDARDS"

This Part analyzes the jurisprudential concepts of rules and standards. Part II.A provides an overview of the distinction between rules and standards, using examples to illustrate the explanatory value of this distinction. Part II.B surveys existing literature on rules and standards. It highlights the role that the distinction between rules and standards has played in multiple schools of academic thought (from Critical Legal Studies to Law and Economics) and of multiple fields of public and private law (ranging from property and contract law to constitutional and administrative law). Part II.C focuses on the surprising absence of academic discussion of the distinction between rules and standards in the field of conflict of laws.

A. *Overview*

One helpful perspective on the rules/standard distinction is set out in Lewis Kaplow's *Rules Versus Standards: An Economic Analysis.*[9] Kaplow suggests that the primary distinction between rules and standards is that rules are legal commands that seek to determine an outcome on a particular fact situation ex ante.[10] Standards, by contrast, seek to determine an outcome on a particular situation ex post.[11]

In other words, when faced with a legal requirement structured as a rule, an individual or entity should be able to predict with significant accuracy the outcome of a particular fact situation. By contrast, an individual facing a legal requirement structured as a standard is unlikely to know what outcome the decision maker will reach in a nonextreme fact situation.[12]

Kaplow also pointed out an aspect of the distinction between rules and standards sometimes overlooked by earlier writers.[13] Many

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9. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

10. *Id.* at 559–60.

11. *Id.*

12. Extreme fact situations may be relatively clear even under a standard. Few decision makers would doubt that driving, drunk, at eighty miles per hour down an icy, residential street does not qualify as exercising "reasonable" care. *C.f.* H.L.A. HART, THE CONCEPT OF LAW 130–32 (1961) (discussing potential certainty of open-textured legal requirements in extreme fact situations).

13. *See* Kaplow, *supra* note 9, at 565–66 & n.13 (noting that some earlier writers did not consider "the level of detail actually employed by the adjudicator" (emphasis omitted)).

earlier writers identified rules with simple legal requirements and standards with complex legal requirements.[14] Kaplow observed that this did not accurately capture the full range of rules and standards, which both exist in simple and complex forms.[15]

1. Rules

A speed limit of, say, fifty-five miles per hour provides a classic example of a simple rule. In its pure form, the rule is highly predictable. If a car is going more than fifty-five miles per hour, then it violates the rule regardless of any extenuating circumstances.[16] It does not matter if the driver is late for an important meeting, rushing an injured person to the hospital, or driving in a manner that is entirely safe given the visibility and weather conditions. A simple rule makes a law predictable, but may lead to unfair results in particular fact situations.

The addition of a school zone transforms the rule into one that is slightly more complex. The rule could take the form of a forty miles-per-hour speed limit most of the time, but with the limit reduced to twenty-five miles per hour during school hours. This would have a similar degree of predictability as the simple, fifty-five miles-per-hour rule. But, it has the possibility of being more appropriately tailored to particular fact situations. Individuals may drive no faster than

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14. *See id.* at 565 n.13 (collecting sources).

15. *See id.* at 566 ("Thus, there are simple and complex rules as well as simple and complex standards.").

16. While the rule is expressed here in its simplest form, it is worth noting that many (perhaps most) real-world speed limits are a combination of a simple rule and a simple standard. The rule portion sets a maximum limit on the speed at which vehicles may travel. The standard portion provides that a person can be cited for traveling at a speed that is unsafe under the circumstances, even if that speed is below the posted speed limit. For example, § 11-801(A) of Title 47 of the Oklahoma Statutes states:

> Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other conditions then existing. No person shall drive any vehicle upon a highway at a speed greater than will permit the driver to bring it to a stop within the assured clear distance ahead.

OKLA. STAT. ANN. tit. 47 § 11-801(A) (2007). Section 11-801(B) indicates:

> Except when a special hazard exists that requires lower speed for compliance with subsection A of this section, the limits specified by law or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle on a highway at a speed in excess of the following maximum limits . . . .

Id. § 11-801(B). *See also* Jeremy Waldron, *Vagueness and the Guidance of Action, in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 58, 59–62 (Andrei Marmor & Scott Soames eds., 2011) (examining a 1917 decision of the Ohio Supreme Court involving a combination of rule-like and standard-like speeding statutes).

twenty-five miles per hour during those times when schoolchildren are expected to be present, but at other times may drive no faster than forty miles per hour.

By contrast, the U.S. Tax Code sits on the far end of the simple-to-complex rule spectrum. While the U.S. Tax Code contains some embedded standards,[17] it is largely a complex, rules-based regulatory regime. It seeks to specify ex ante how the tax laws will apply to a particular fact situation and to eliminate, to the degree possible, individual discretion. Beneath its formidable complexity is an attempt to specify outcomes with a degree of precision that no standard can accomplish.

2. Standards

An example of a simple standard would be a general reasonableness requirement applied to a simple fact situation. It could take the form of requiring individuals to drive at a reasonable speed on a particular stretch of road, with reasonableness determined by the totality of the factual circumstances. The standard would not attempt to specify what facts should be considered or their relative priority.

A slightly more complicated standard could take the form of a requirement that drivers proceed at a reasonable speed given the weather conditions and time of day. This slightly more complex standard still relies on the basic criterion of reasonableness, but incorporates two specific aspects of the fact situation that the decision maker should consider in reaching a decision.

A still more complex standard could incorporate a nonexhaustive, multifactor balancing test. Examples include the public-interest and private-interest factors used in *forum non conveniens* analysis, [18] § 145 (the basic torts provision) of the

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17. One example of a standard embedded in the tax code is the economic substance doctrine now codified as 26 U.S.C. § 7701(o) (Supp. V 2011).

18. The *forum non conveniens* analysis requires a federal trial court to balance competing private-interest factors. Piper Aircraft Co. v. Reyno, 454 U.S. 253, 255–56 (1981). The trial court's balancing of these factors is to be overturned only for abuse of discretion. *Id.*

The private-interest factors courts must consider include: "relative ease of access to sources of proof," "availability of compulsory process," "possibility [if appropriate] of view of premises," "enforcibility of a judgment," and "all other . . . problems that make trial of a case easy, expeditious, and inexpensive." Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947). Courts are instructed to "weigh relative advantages and obstacles to fair trial." *Id.* The public-interest factors courts must consider include: "[a]dministrative difficulties [that] follow . . . when litigation is piled up in congested centers instead of being handled at its origin," the burden of jury duty "upon the people of a community which has no relation to the litigation," the benefits of "holding trial in the[ ] view and reach" of affected persons, the "local interest in having localized controversies decided at home," and the "appropriateness . . . [of] having the trial of a diversity case in a

Restatement (Second) of Conflict of Laws,[19] and—most relevant for our purposes—the reasonableness factors set out in § 403 of the Restatement (Third) of Foreign Relations of the United States.[20]

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forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 508–09.

19. The basic torts provisions of the Restatement (Second) of Conflict of Laws provides:

> § 145. The General Principle
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 403 (1987). Section 403(2) provides:

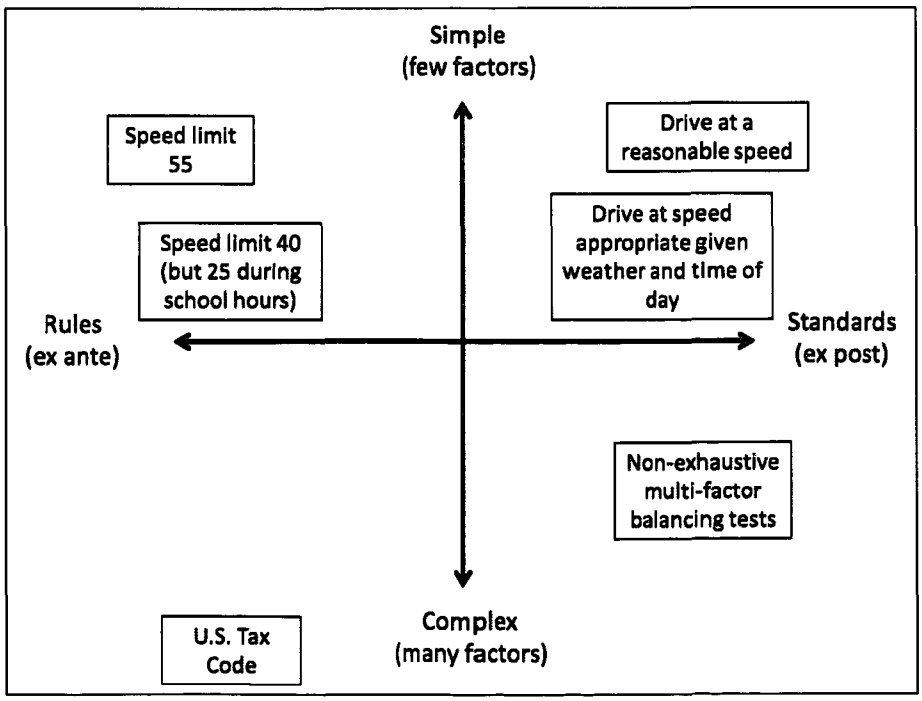
> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

Figure 1, below, illustrates the relationship between the rule/standard distinction and the simple/complex distinction. This Article sets each out as a spectrum, rather than a binary decision, because of the various intermediate options between the two extremes. The rule/standard distinction forms the horizontal axis, with pure rules on the far left and pure standards on the far right. The simple/complex distinction forms the vertical axis, with simple requirements (those involving the analysis of a few factors) at the top and complex requirements (those involving the analysis of many factors) at the bottom.

The intersection of the rule/standard spectrum and the simple/complex spectrum results in four quadrants. The upper-left quadrant contains simple rules. Moving clockwise, the upper-right quadrant shows simple requirements structured as standards rather than rules. The bottom-right quadrant contains complex requirements structured as standards. The bottom-left quadrant contains complex requirements structured as rules. Throughout the diagram, those examples that approximate the relevant ideal type are closer to the outside; those requirements further from the relevant ideal type are close to the center.

Figure 1—Examples of Typical Rules and Standards



B. *Existing Literature*

Jurisprudential thinkers have long recognized that legal commands exist along a spectrum between rules at one end and standards at the other. Terminology for signaling these concepts has varied over time, but rules and standards are today the most generally recognized terms.[21] Before these became the relatively settled terms, H.L.A. Hart referred to what we now call standards as "open-textured" legal requirements in 1961.[22] Eight years later, Kenneth Culp Davis wrote about the relationship between "law" and "discretion" as forms of government decision making.[23] Judge J. Skelly Wright, in reviewing Davis's work, spoke similarly of the relationship between administrative "discretion"[24] and "binding, prospective, rules."[25]

Even earlier, late nineteenth century jurisprudential views emphasized rule-like legal requirements derived from natural law theory. By the early twentieth century, the legal realists had demonstrated that rule-based conceptualism did not accurately predict the actual decisions of courts. The realists' rejection of conceptualism had its roots in a functional jurisprudence with a heavy focus on understanding the importance of facts, rather than legal concepts, in predicting the actual decisions of courts.[26]

Modern discussion of rules and standards in legal analysis begins with Duncan Kennedy's 1976 article, *Form and Substance and Private Law Adjudication.*[27] In this enormously influential article,[28]

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21. *See, e.g.*, Kaplow, *supra* note 9 (using the terms *rules* and *standards*); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (same); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (same); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (same). Margaret Jane Radin traces the use of the term *standard* to Duncan Kennedy's 1976 article. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 795 n.44 (citing Kennedy, *supra*, at 1688). With the more recent publication of Henry Hart and Albert Sacks's famous mimeographed-but-unpublished teaching materials, we can now trace the use of the terms *rules* and *standards* to signify these concepts at least to the final version of their *Legal Process* materials. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 138–41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (using the terms *rules* and *standards* in largely the same manner they are used in later academic discussions).

22. HART, *supra* note 12, at 124.

23. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969).

24. J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 594 (1972).

25. *Id.* at 593.

26. LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960, at 30 (1986).

27. Kennedy, *supra* note 21.

Kennedy described rule-based decision making as being motivated by a concern for "form" and a worldview based on "individualism."[29] He contrasted this with standards-based decision making, motivated by a concern for "substance" and a worldview based on "altruism."[30] According to Kennedy, those whose worldview centers on self-reliance and the legitimacy of self-interested activity will have a preference for rules.[31] Those whose worldview privileges sacrifice, sharing, and mercy will have a preference for standards.[32]

Kennedy's article is often considered one of the early works in the Critical Legal Studies movement. However, economically oriented scholars soon joined in the rules-and-standards discussion.

In the area traditionally categorized as private law, the rule/standard dichotomy has been applied as a way of understanding the battle of the forms in contract law[33] and judicial responses to forfeiture doctrines in property law.[34] In the area traditionally categorized as public law, the rule/standard dichotomy has been applied to the appropriate level of complexity for administrative rules;[35] the Supreme Court's approach to economic regulation;[36] and the Supreme Court's approach to controversial, publicly salient, constitutional law subjects.[37] In addition to issues arising in specific fields of substantive law, the distinction between rules and standards has also been applied by empirical scholars[38] in more philosophically

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28. On the lasting influence of this article, see William Fisher, *Introduction* to *Duncan Kennedy*, *in* THE CANON OF AMERICAN LEGAL THOUGHT 647, 650–57 (David Kennedy & William W. Fisher III eds., 2006).

29. Kennedy, *supra* note 21, at 1685, 1701–02.

30. *Id.*

31. *Id.* at 1713.

32. *Id.* at 1717.

33. Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1221 (1982).

34. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 597–604 (1988).

35. Colin A. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66 (1983).

36. Frank A. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 5–8 (1984).

37. *See* Sullivan, *supra* note 21, at 27–56 (discussing Supreme Court rulings during the 1991 term with respect to abortion rights, the Establishment Clause, hate speech, public forums, property rights, and federalism); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44 (1987) (discussing the role of standard-like balancing tests in constitutional law, without explicitly emphasizing the rule/standard distinction); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (arguing that the rule/standard distinction permeates many areas of law).

38. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1536–39 (2008) (demonstrating that, in voting rights cases, rule-like provisions constrained judicial behavior more than standard-like provisions).

oriented jurisprudential work[39] and in broader analyses of legal policy that cross substantive fields.[40]

C. *Rules, Standards, and the Conflict of Laws*

Given the substantial attention that philosophically, critically, and economically oriented legal thinkers have paid to the distinction between rules and standards, it is surprising how little direct attention it has received in the field of conflict of laws. This is not for its lack of importance to the field.

The traditional approach to choice of law was an entirely rule-based system. This system, set out in the First Restatement of Conflict of Laws, sought to predict in advance the result in any individual case. The legal realists' rejection of the First Restatement[41] was in large part motivated by dissatisfaction with the results produced by this rule-based theory in individual cases. Moreover, the initial cases rejecting the traditional view appeared to be substituting a standard of "most significant contacts" for the strict rules of the First Restatement.[42]

Yet before the First Restatement could be replaced by standards, legal academics began to develop alternative, but still rule-based, approaches. The first and most well known of these is Brainerd

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39. KARL N. LEWELLYN, THE THEORY OF RULES 77–82 (Frederick Schauer ed., 2011) (posthumously published manuscript); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 1–2 (1991); Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 703 (1991); Radin, *supra* note 21, at 795–96.

40. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 37–38 (1995) (exploring the trade-off between "simple rules" and "justice in the individual case"); Sunstein, *supra* note 7, at 960–68. Sunstein breaks the spectrum of rules and standards down into additional subcategories. Sunstein, *supra* note 7, at 960–68. From most rule-like to least rule-like, he identifies "rules," "rules with excuses," "presumptions," "factors," "guidelines," "standards," and "untrammeled discretion" as forms that legal requirements can take. *Id.* Sunstein also discusses "principles" and "analogies," but does not appear to claim that these are additional forms that legal requirements can take. *See id.* at 966–68. Instead, he appears to take the position that principles may be one of two things. They can be "political or moral" ideas used to justify legal requirements, in whatever format they take. *Id.* at 966. Alternatively, they can be "legal principles . . . brought to bear on the resolution of cases," but whose "status is somewhat mysterious." *Id.*

41. This traditional approach is associated most heavily with Justice Joseph Story, *see, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC: IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1846), and Professor Joseph Beale, *see, e.g.*, JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935). Beale was the reporter for the Restatement (First) of Conflict of Laws (1934).

42. *See, e.g.*, Haag v. Barnes, 175 N.E.2d 441, 443–44 (N.Y. 1961) (applying Illinois law as having the "most significant contacts" and being the "center of gravity" of the relevant relationship); Auten v. Auten, 124 N.E.2d 99, 103 (N.Y. 1954) (applying English law as the "law of the place with the most significant contacts").

Currie's governmental-interest analysis. [43] In its pure form, governmental-interest analysis purports to be able to solve all conflict-of-law problems with six simple rules.[44]

Dissatisfaction with one aspect of Currie's solution to the true-conflict problem led to the development of alternative theories.[45] William Baxter's theory of comparative impairment accepted most of

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43. *See* BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in*, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177 (1963) [hereinafter CURRIE, *Notes*] (exploring the broader implications of problems in the conflict of laws); Brainerd Currie, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242–43 (1963) [hereinafter Currie, *Comments*].

44. Currie, *Comments*, *supra* note 43, at 1242. In what seems unlikely to have been a coincidence, these six proposed rules were published in the home law review of those responsible for drafting the Restatement (Second) of Conflict of Laws—and were explicitly offered as "a substitute for all that part of the *Restatement* dealing with choice of law." *Id.* The six rules Currie proposed were the following:

> § 1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.
>
> § 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.
>
> § 3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.
>
> § 4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.
>
> § 5. If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum—until someone comes along with a better idea.
>
> § 6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.

Currie, *Comments*, *supra* note 43, at 1242–43. Currie's § 2 has come to be known as a "false conflict," § 3 as an "apparent conflict," § 4 as a "true conflict," and § 5 as an "unprovided-for case."

45. Currie's solution to true conflicts (situations where two or more states had an interest in having their law applied, *see id.*) was to apply forum law. For those less comfortable with a strong forum preference than Currie, this approach to true conflicts was one of the most significant problems with governmental-interest analysis. *See* LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 215 (6th ed. 2011) (noting that many academics accepted Currie's solution to false conflicts but rejected his solution to true conflicts).

Currie's rules, but substituted an alternative, slightly less rule-like, solution to the true-conflict problem.[46] Robert Leflar's choice-influencing considerations (often described as the "better rule" approach) proposed a far more standard-like set of factors that incorporated the basic idea of state interests on which Currie's theory was based.[47]

Yet even the most standard-like of these Currie-derived approaches is far more rule-like than the "New York approach" and its derivatives.[48] By 1972, eighteen years after its first "modern"

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46. William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18–22 (1963). For true-conflict cases, Baxter proposed replacing Currie's forum preference with a requirement that the court apply the law of the state whose policy objectives would be most harmed by a decision not to apply its law. *Id.* at 18. Baxter's theory is closer to a rule than a standard because it purports to be able to determine in an objective manner which state's interest is least impaired. *See id.* It is less rule-like than Currie's theory because there is more possibility for the identity of the decision maker to influence the outcome than under the pure version of Currie's theory.

47. *See* Robert Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586–88 (1966). The five "choice influencing considerations" Leflar identified are: "Predictability of Results," "Maintenance of Interstate and International Order," "Simplification of the Judicial Task," "Advancement of the Forum's Governmental Interests," and "Application of the Better Rule of Law." *Id.* at 1586–87.

48. There are two broad branches to modern choice-of-law theory. The first branch derives from Currie's governmental-interest analysis; the second branch derives from a series of decisions by the New York Court of Appeals.

Each theory in the Currie-derived branch derives from one or more academic articles proposing a general solution to perceived conflict-of-law problems. *See, e.g.*, Currie, *Comments*, *supra* note 43, at 1242–43 (governmental-interest analysis); Baxter, *supra* note 46, at 18–22 (comparative impairment); Leflar, *supra* note 47, at 1586–88 (choice-influencing considerations/better rule). These academic solutions were only later applied by courts to concrete fact situations. *See, e.g.*, Bernkrant v. Fowler, 360 P.2d 906, 907 (Cal. 1961) (governmental-interest analysis); Bernhard v. Harrah's Club, 546 P.2d 719, 723–24 (Cal. 1976) (comparative impairment); Milkovitch v. Saari, 203 N.W.2d 408, 412–17 (Minn. 1973) (choice-influencing considerations/better rule).

By contrast, the New York approach to choice of law developed case by case in a series of appellate decisions. *See generally* BRILMAYER ET AL., *supra* note 45, at 179–93 (summarizing the evolution of choice-of-law theory in the New York Court of Appeals). It began with two contract cases based on a standard-like grouping of contacts. Haag v. Barnes, 175 N.E.2d 441, 443–44 (N.Y. 1961); Auten v. Auten, 124 N.E.2d 99, 101–02 (N.Y. 1954). This was followed by the famous case of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), which began to look to state interests as well as contacts, but continued to look at this combination of contacts and interests in a standard-like manner. *Id* at 284–85.

The New York Court of Appeals began to flirt with more rule-like approaches in later cases, with a concurring opinion in *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969), and the majority opinion on *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), purporting to set out a series of rule-like requirements for guest-statute cases. But even *Neumeier*'s supposedly rule-like versions of the New York approach contained a broad, standard-like exception:

> In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred

decision,[49] the New York Court of Appeals acknowledged that its choice-of-law decisions "have . . . lacked consistency"—a predictable result of a standard-like approach to decision making.[50]

The Restatement (Second) incorporates an uneasy mix of Currie-derived and New York-derived elements. Historically, this awkward combination appears to have resulted from an initial drafting by scholars who favored the standard-like New York approach, followed by incorporation of Currie-derived methods after intense criticism of the initial drafts.[51] This combination of rule-like and standard-like elements—in an undifferentiated and somewhat contradictory manner—has produced a choice-of-law methodology that garners both widespread judicial acceptance and widespread academic criticism.

It is puzzling that conflict of laws, a field so dominated by a battle between rules and standards, has been relatively untouched by the existing academic analyses of these concepts. The few exceptions include a recent paper by Lea Brilmayer and Rachel Anglin on the problems caused by "single-factor triggers" in domestic choice of law[52]

> but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

Neumeier, 286 N.E.2d at 458.

Later, the New York Court of Appeals emphasized what it saw as a distinction between loss-allocating and conduct-regulating legal requirements, with some hints of a return to a preference (if not a rule) for application of the law of the place of injury. Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1003 (N.Y. 1994); Schultz v. Boy Scouts of Am., 480 N.E.2d 679, 686 (N.Y. 1985). Commenting on New York's more recent cases, one leading conflict-of-laws casebook has observed:

> After reading [the cases discussed in this footnote] and other New York cases, one might conclude that New York's choice-of-law rule for torts boils down to: Apply the law of the place of injury unless the issue involves a loss-allocation dispute between common domiciliaries, in which case apply the law of the domicile. If this is correct, then the New York "revolution" amounts to nothing more than the First Restatement with a narrow exception for common domicile cases involving loss-allocation issues . . . . [However, l]ower appellate courts in the state view New York's approach as more complex than the simplistic rule suggested above.

BRILMAYER ET AL., *supra* note 45, at 193.

49. *Auten*, 124 N.E.2d at 99.

50. *See Neumeier*, 286 N.E.2d at 457 (pointing to this inconsistency in multi-state highway accident cases).

51. *See generally*, William A. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash*, 34 MERCER L. REV. 645, 655–64 (1983) (describing the drafting history of the Restatement (Second) of Conflict of Laws).

52. *See* Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1127 (2010) ("The sterile character of much contemporary choice of law debate is a direct result of the fact that conventional choice-of-law approaches are searching for something that does not exist—a single, inherently determinative contact that, standing alone, is sufficient to justify the application of local law."); *see also* BRILMAYER ET AL., *supra* note 45, at 193

and the work done by Paul Stephen on the political economy of choice of law.[53] This Article begins to fill that gap by demonstrating that many of the major disputes about the territorial scope of U.S. federal law break down into disagreement over whether the territorial scope statute should be set out in a rule-like or standard-like manner.

* * *

This Part began with an overview of the distinction between rules and standards, summarized the existing literature, and closed with a discussion of the surprising lack of analysis regarding rules and standards in the field of conflict of laws. Part III uses the rule/standard dichotomy as a way of understanding the territorial scope of federal statutes. The core insight of Part III is that the distinction between rules and standards can operate at two levels. First, the substantive requirements of the statute can be structured as either a rule or a standard. Second, the territorial scope of the statute can be structured to the rule or standard. Understanding whether the territorial scope is structured as a rule or a standard is key to understanding subsequent judicial treatment of the statute.

III. THREE CATEGORIES OF TERRITORIAL SCOPE

This Part divides federal statutes into three categories based on the textual information Congress provides about their territorial scope.[54] Part III.A discusses *extraterritorial rules*. These are conduct-regulating laws that contain language explicitly stating that they

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(noting that development of the New York approach to choice of law "highlights the tensions between rules and standards").

53. Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957, 961, 966 (2002) ("Rather than global, one-size-fits-all standards such as 'reasonableness,' we need jurisdictional rules that pursue precision within the confines of the structure and purposes of particular regulatory schemes."); *see also* Paul B. Stephan, *The Political Economy of Extraterritoriality* 11–17 (APSA 2011 Annual Meeting Paper), [hereinafter Stephan, *Extraterritoriality*] *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=1900156 ("Vague Standards, the inevitable product of judicial management of competing policy claims, invite litigation, which lawyers like and clients do not."). There is a somewhat older conflict-of-laws literature that in effect addresses the rule/standard distinction, but without using the rule/standard terminology or engaging the jurisprudential work outside of the conflict-of-laws field. *See, e.g.*, Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law*, 226 RECUEIL DES COURS 281 (1991). For an earlier work predating modern writing on the rule/standard distinction, see Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

54. Of course, pure examples of these categories are extreme situations. There are many gray areas in between, but many real-world laws will tend toward one of the three.

apply extraterritorially.[55] Part III.B discusses *territorially limited rules*. These are conduct-regulating laws that contain language limiting their application to the territory of the regulating state. Part III.C discusses *potentially extraterritorial standards*. These are conduct-regulating laws containing general language that does not clearly state whether the statute applies outside the United States.

Dividing the statutes into these three categories is useful for several reasons. Extraterritorial rules and territorially limited rules require courts to do little to determine territorial scope, as they contain a clear statement of either extraterritoriality or nonextraterritoriality. The categorization of many major aspects of U.S. economic policy as extraterritorial rules explains an otherwise curious phenomenon: the striking paucity of published appellate decisions examining the territorial scope of some of the statutes the U.S. government uses most aggressively to affect foreign behavior.[56]

The interpretive action occurs, instead, when courts examine those statutes that are structured as potentially extraterritorial standards. These statutes contain no clear statement of extraterritoriality or nonextraterritoriality, but are phrased in a broad manner that could potentially apply worldwide. This results in three significant consequences: (1) it makes it possible for courts to uphold enforcement in situations that seem, ex post, to be appropriate; (2) it makes it possible for courts to decline enforcement in situations that seem, ex post, to be inappropriate; and (3) it creates a penumbra of situations that are neither clearly within nor clearly outside the statute, but which require foreign entities and individuals to consider the possibility of enforcement.[57]

It is important to emphasize that the distinction between rules and standards highlighted in the following subparts is solely with respect to the geographic scope of the statute. Substantively, the legal requirement underlying extraterritorial rules, territorially limited rules, and potentially extraterritorial standards can be rule-like, standard-like, or anywhere in between.

A. *Extraterritorial Rules*

The first category of statutes that require little judicial involvement to determine territorial scope is the extraterritorial rule. Numerous U.S. statutes fall into this category. These include criminal statutes applying in the "special maritime and territorial jurisdiction

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55. Sometimes these statutes use terms such as *extraterritorial* or *extraterritorially*, other times they simply state that they apply to activities in foreign countries.

56. The Foreign Corrupt Practices Act is one prominent example.

57. On the effects of the uncertainty created by potentially extraterritorial standards, see *infra* Part VII.B.

of the United States" (SMTJUS) and the "special aircraft jurisdiction of the United States" (SAJUS).[58] The SMTJUS statute extends federal versions of many traditional crimes (including assault, arson, murder, and kidnapping)[59] to the high seas, areas outside the jurisdiction of any state, various forms of transportation to and from the United States, and properties used by U.S. personnel on official business in foreign countries.[60] The SAJUS statute extends a more limited set of criminal statutes to certain aircraft in flight.[61]

Extraterritorial rules also include explicitly extraterritorial statutes, such as the FCPA, which criminalizes bribes to foreign government officials to obtain or retain business; the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), which criminalizes sexual activity with minors in foreign countries;[62] the U.S. Tax Code, which applies explicitly to foreign-earned income of U.S. persons; and various U.S. money laundering laws, which explicitly apply extraterritorially in enumerated situations.[63]

In all of these statutes, Congress has included an explicit statement of extraterritorial scope and a relatively precise definition of at least some of the conduct that will subject an individual to a legal penalty for action taken outside the United States. When faced with statutes structured as extraterritorial rules, the path of least resistance is for courts to accept Congress's statement of its own intent.

B. *Territorially Limited Rules*

The second category of statutes that requires little judicial involvement to determine territorial scope is the territorially limited

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58. *See* 18 U.S.C. § 7 (2006) (setting out the special maritime and territorial jurisdiction of the United States); 49 U.S.C. § 46501(2) (2006) (setting out the special aircraft jurisdiction of the United States); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 44–45 (2007) (listing statutes referencing the special maritime and territorial jurisdiction of the United States); *id.* at 45 (listing statutes referencing the special aircraft jurisdiction of the United States).

59. *See* DOYLE, *supra* note 58, at 44–45 (listing these and other examples).

60. 18 U.S.C. § 7.

61. *See* 49 U.S.C. § 46501(2).

62. PROTECT Act, Pub. L. No. 108-21, § 105, 117 Stat. 650 (2003). The PROTECT Act criminalizes virtually any sex act that a U.S. citizen (or permanent resident) engages in, in a foreign country, with a person under age eighteen. *Id.*

63. *See* 18 U.S.C. § 1956(b)(2) (2006) (providing explicitly for jurisdiction over "foreign persons" in enumerated situations); *id.* § 1956(f) (providing explicitly for extraterritorial jurisdiction when the relevant conduct "is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000").

rule. Some statutes contain explicit statements of nonextraterritoriality. Examples include certain provisions relating to banking regulation, [64] performance by military musicians in competition with civilian musicians, [65] depletion of geothermal deposits, [66] use of Department of Defense appropriations for golf courses, [67] reporting requirements for cash transactions [68] and monetary-instrument transactions, [69] and use of funds for rural electrification projects.[70]

Other statutes qualify as territorially limited because they explicitly relate to physical space within the United States. A small selection of examples includes statutes relating to grazing on U.S. public lands,[71] removal of fossils from public lands,[72] and drain covers on public pools and spas in the United States.[73] Others contain less explicit statements (patent law)[74] or no explicit statement (copyright

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64. 12 U.S.C. § 1828(j)(3) (2006). This subsection provides: (A) that certain statutory provisions relating to "[t]ransactions with affiliates . . . shall not apply with respect to a foreign bank solely because the foreign bank has an insured branch"; and (B) that certain provisions relating to "[e]xtensions of credit to officers, directors, and principal shareholders . . . shall not apply with respect to a foreign bank solely because the foreign bank has an insured branch, but shall apply with respect to the insured branch." *Id.* § 1828(j)(3)(A)–(B).

65. 10 U.S.C. § 974 (2006).

66. 26 U.S.C. § 613 (2006).

67. 10 U.S.C. § 2491a (2006).

68. 26 U.S.C. § 6050I (2006).

69. 31 U.S.C. § 5331 (2006).

70. 7 U.S.C. § 906a (2006).

71. *See, e.g.*, 43 U.S.C. § 315 (2006) (relating to the establishment and use of grazing districts on public lands).

72. *See, e.g.*, 16 U.S.C. § 470aaa to 470aaa-11 (2006) (regulating removal of "paleontological resources" from federal lands).

73. *See, e.g.*, 15 U.S.C. § 8003(c) (2006) (requiring pool and spa drain covers to be in compliance with American National Standards Institute standards).

74. Federal patent law has existed in the United States since 1790. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 520 (1997) (citing Patent Act of 1790, ch. 7, 1 Stat. 109 (repealed 1793)). In 1857 and again in 1913, the Supreme Court interpreted the then-existing patent laws as confined to the physical territory of the United States. Brown v. Duchesne, 60 U.S. 183, 195 (1857); Dowagiac Mfg. Co. v. Minn. Moline Plow Co., 235 U.S. 641, 650 (1915). When Congress revised the U.S. patent laws in 1952, it provided a patentee with a temporary right "to exclude others from making, using, or selling the invention *throughout the United States*." Patent Act of 1952, Pub. L. No. 82-593, § 154, 66 Stat. 792 (emphasis added); *see also* Bradley, *supra*, at 520 (emphasizing same text). Similar language is retained in the current version of the statute, which also prohibits "offering for sale" or "importing" a patented product or process into the United States. 35 U.S.C. § 154(a)(1) (2006). Section 154(a)(1) of Title 35 of the U.S. Code indicates:

> Contents.—Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling

law),[75] but cover fields where statutes have existed—and have been treated by courts as territorially limited—since the late eighteenth or early nineteenth centuries.[76] Like extraterritorial rules, territorially limited rules require little judicial involvement in questions of territorial scope.

C. *Potentially Extraterritorial Standards*

Unlike the first two categories, the third category of statutes requires extensive judicial involvement in questions of territorial scope. Potentially extraterritorial standards do not contain an explicit indication of territorial scope and may contain general language that could be read to apply worldwide.

Examples include § 1 of the Sherman Act, prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade";[77] § 10(b) of the Securities Exchange Act of 1934, prohibiting "in connection with the purchase or sale of any security," the use of "any manipulative or deceptive device or contrivance";[78] and § 33 of the Jones Act, permitting "[a] seaman injured in the course of employment" to "elect to bring a civil action at law, with the right of trial by jury, against the employer."[79]

These statutes contain no explicit statement as to either extraterritoriality or nonextraterritoriality, and their subject matters neither require nor exclude the possibility of extraterritorial

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> throughout the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.

Id. As suggested by a combination of statutory text and preenactment case law, the Supreme Court has treated U.S. patent law as setting out a territorially limited rule.

75. Copyright law, like patent law, has been governed by federal statute since 1790. *See* Bradley, *supra* note 74, at 523 (citing Copyright Act of 1790, ch. 15, 1 Stat. 124). The basic structure of current U.S. copyright law dates to the Copyright Act of 1976. *See* Maria A. Pallante, *Preface* to CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at V (2011). Unlike the patent statute, the copyright statute does not contain text suggesting it is limited to U.S. territory. *See* Bradley, *supra* note 74, at 523; *see also* 17 U.S.C. § 102 (2006) (setting out general subject matter eligible for copyright). Were it a new statute today, it could have been treated by courts as a potentially extraterritorial standard. However, it was interpreted in 1908 as a strictly territorial statute, United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 266 (1908), and this appears to have been its consistent treatment in lower courts, *see, e.g.*, Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 23 F.3d 1088, 1089 (9th Cir. 1994) (en banc), up to and following the United States' accession to the Universal Copyright Convention in 1955, the Berne Convention on Literary and Artistic Works in 1989, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights in 1994.

76. *See supra* notes 74–75.

77. 15 U.S.C. § 1 (2006).

78. 15 U.S.C. § 78j(b) (2006).

79. 46 U.S.C. § 30104 (2006).

application.[80] Because of this ambiguity, the territorial scope of a statute structured as a potentially extraterritorial standard is a subject that permits courts to exercise substantial discretion.[81]

Broad language paired with an omission of any statement with respect to territorial scope is most likely to result in a potentially extraterritorial standard. During periods when antiextraterritoriality interpretive methods dominate the federal courts, potentially extraterritorial standards are likely to be supplemented with territorially limited rules that remove some conduct from the initial standard's scope. Conversely, during periods when proextraterritoriality interpretive methods dominate, potentially extraterritorial standards are likely to be supplemented with extraterritorial rules that encompass situations previously governed by the standard.

Of course, drafters and lobbyists confident in their ability to predict their future preferences will prefer either extraterritorial rules or territorially limited rules for particular categories of conduct. However, interest-group theory and prior legislative outcomes both suggest that it is difficult to secure agreement on precise statements as to geographic scope. One can expect that Congress will continue to pass laws structured as potentially extraterritorial standards. And, similarly, we can expect that courts will continue to reach fact-centered, case-by-case decisions on the territorial scope of statutes.

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Figure 2, below, sets out examples of statutes falling into the three categories discussed above. References to Supreme Court cases dealing with the territorial scope of the relevant statutes are included on the line below each statute. Note that the canonical cases cluster exclusively in the right-hand column. The next Part will focus on the methods courts use to resolve cases involving potentially extraterritorial standards.

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80. *Cf.* Lauritzen v. Larsen, 345 U.S. 571, 576–77 (1953) (commenting on the broad language of the Jones Act).

81. Courts recognize that Congress often fails to specify territorial scope, and many modern statutory-interpretation theories hold that statutes must be read on the assumption that Congress is effectively delegating issues on which it cannot reach a consensus to court and agency interpretation. Assuming that issues of territorial scope arise relatively infrequently and are of less concern to domestic constituents than many other issues, it is not unreasonable to assume that reaching consensus on territorial scope is likely to be excessively costly for many statutes.

Figure 2—Territorial Scope of U.S. Statutes

Extraterritorial Rules	Territorially Limited Rules	Potentially Extraterritorial Standards
• FCPA • PROTECT Act • Aspects of Tax Code • Aspects of money-laundering law • Foreign-establishment registration requirements in many regulatory programs • SMTJUS • SAJUS	• Statutes relating to physical space in the United States • Patent law • Copyright law • Various miscellaneous statutes[82]	• Sherman Act § 1 American Banana (1909) Hartford Fire (1993) Empagran (2004) • Sec. Exchange Act of 1934, § 10b Morrison (2011) • Various employment-related statutes • pre-1991 title VI Aramco (1991) • Jones Act Lauritzen (1953) Romero (1959) • Fair Labor Standards Act Vermilya-Brown (1949) • Eight Hour Law Foley Bros. (1949) • Federal Employers Liability Act Chisholm (1925) • Lanham Trade-Mark Act Bulova (1952)

IV. THREE TYPES OF INTERPRETIVE METHODS

This Part analyzes the interpretive methods that courts use to determine whether a potentially extraterritorial standard applies in a specific fact situation. Most extraterritoriality decisions involve both detailed discussion of the case's facts and reference to one or more canons of interpretation. From the rules and standards perspective,

82. These miscellaneous statutes deal with topics such as where military musicians can compete with civilian musicians and where the Department of Defense can use appropriate funds to build a golf course. *See supra* notes 71–73 and accompanying text.

the specific interpretive method applied by a court is less relevant than the result it encourages.

Part IV.A discusses *proextraterritoriality* interpretive methods, which push the court toward finding that a statute applies extraterritorially. Part IV.B discusses *antiextraterritoriality* interpretive methods, which push in the opposite direction, toward finding that a statute does not apply extraterritorially. Part IV.C discusses *territorially neutral* interpretive methods, which do not push the court in either direction. This set of territorially neutral interpretive methods is the largest group and contains most of the broad theories of statutory interpretation.

Before developing these methods in more detail, it is useful to begin with a more general observation: extraterritorial statutes have two basic preconditions. First, prevailing doctrine must accept the idea that state power can extend beyond the regulating state's territory. Second, prevailing doctrine must accept that there is no bar—in either positive or natural law—to more than one state purporting to apply its statutory law to a particular fact situation.

In the United States, traditional approaches to choice of law were hostile to extraterritorial regulation. This began to change in the 1930s, as the Supreme Court began to accept the idea that states could apply positive law to events in other states.[83] A term introduced by the Court in *Alaska Packers Association v. Industrial Accident Commission of California*, "governmental interest," [84] became important in Currie's proposed choice-of-law methodology, governmental-interest analysis.[85] Academics and courts developed numerous, modified versions of Currie's ideas, each of which tended to be more proextraterritorial (in state law, rather than federal law) than traditional choice-of-law methods.[86]

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83. Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 547 (1935) (upholding California's application of the California worker's compensation statute to injury of Mexican citizen in Alaska). Eight years earlier, the Permanent Court of International Justice had rendered a decision that two or more countries could have concurrent criminal jurisdiction as a matter of public international law. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 307 (Sept. 7).

84. *Alaska Packers*, 294 U.S. at 547.

85. Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 466 (noting use of the term "interest" in *Alaska Packers* and *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493 (1939)).

86. On academic alternatives to Currie's theory, see *supra* notes 45–48 and accompanying text. The Restatement (First) was based on a territorial theory of law, seeking to apply the law of the territory where the right "vested." Each the other theories was more proextraterritorial than the traditional method is; each of these other theories accepted the idea of applying the law someplace other than the territory where some "last act" took place.

A. *Proextraterritoriality*

Proextraterritoriality interpretive methods place a thumb on the scale in favor of extraterritorial application. Part IV.A.1 discusses analysis of state interests, both in its purer Curriean form and in the more relaxed versions common in extraterritoriality cases today. Part IV.A.2 discusses the last-in-time rule—the doctrine that, as a matter of U.S. domestic law, Congress is not constrained by international law. Part IV.A.3 discusses the traditional bases for jurisdiction in international law, which are sometimes examined by U.S. courts deciding extraterritoriality cases.

1. Analysis of Interests

Pure interest analysis, of the type advocated by Currie, focuses the extraterritoriality inquiry on a specific conception of objectively legitimate state action. In particular situations, states have sufficient interests to apply their law extraterritorially; in others, they do not.[87] Under the pure version of Currie's theory, states have interests only in providing recovery to in-state plaintiffs and protecting in-state defendants.[88]

In that pure form, interest analysis could perhaps be seen as territorially neutral. At times, it permits states to apply their law; at other times, it does not allow them to do so—even if the legislature explicitly expresses a will to, say, protect an out-of-state defendant and harm an in-state plaintiff.

In its less pure form, however, the idea of a state interest interacts with the effects doctrine to act as a one-way ratchet in favor of extraterritorial application. The basic change is this: in its pure Curriean form, an interest exists only when a statute is meant to favor a domiciliary. Outside of its pure Curriean form, however, a state can be deemed to have an interest in regulating almost anything that has an effect within its territory.[89] In this latter form, the only limit on a state's interest is the degree of effect necessary to

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87. *See generally* CURRIE, *Notes*, *supra* note 43, at 177–87 (1963) (explaining circumstances in which states have an interest in the extraterritorial application of their laws).

88. *See id.*

89. In other words, the idea of a state interest is not sufficiently precise to impose meaningful limits on the scope of a state's extraterritorial authority. *See* Brilmayer, *supra* note 85, at 460 (noting, with respect to domestic choice of law, that the term *interest*—as used in governmental-interest analysis—"ha[s] no clear meaning[ ] any more"); *c.f.* Aleinikoff, *supra* note 37, at 1002 (criticizing the use of undefined "interest[s]" as a basis for deciding First Amendment cases, and suggesting that this concept can permit courts to rely on policy considerations more appropriate to legislative than judicial decision making).

justify that interest.[90] A butterfly flapping its wings in China may not be enough, but many basic regulatory interests will be—at least to the extent they find the ear of a sympathetic court.

2. Last-in-Time Rule

While not strictly a statutory construction doctrine, the last-in-time rule—the doctrine that Congress has the power to act contrary to international law[91]—plays a proextraterritoriality role. Frequently, there is some question (often of a standard-like character) as to whether extending a particular law extraterritorially is permitted by public international law.[92] Congress's power to act contrary to international law relegates the issue to a matter of congressional intent.[93] As developed below, there is a presumption that Congress does not intend to act contrary to international law, but this can be overridden by a clear statement of intent.[94] With a clear statement, there is no longer any question of international law for a U.S. court to address.

3. Traditional Categories of International Jurisdiction

The third set of proextraterritoriality doctrines is the traditional set of "categories" or "principles" thought to justify state jurisdiction

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90. *See supra* note 89.

91. Breard v. Green, 523 U.S. 371, 376 (1998) (per curiam); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson (Head Money Cases), 112 U.S. 580, 597 (1884). While these cases dealt explicitly with international treaties, it is widely accepted that Congress has the constitutional power to take actions that violate customary international law. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("This rule of construction [the presumption that Congress does not intend to violate international law] reflects principles of customary international law—law that (we must assume) Congress *ordinarily* seeks to follow." (emphasis added)).

Indeed, the existence of a presumption that Congress does not intend to act contrary to international law, *see infra* Part IV.B.2, assumes that Congress can—and sometimes does—take actions contrary to international law. This power does not mean that the United States will not suffer consequences (such as being on the receiving end of retaliatory actions by other countries, or being ordered to pay reparations by an international tribunal) when Congress acts contrary to international law; it simply means that there is no domestic law bar to Congress choosing to do so.

For a general overview of the last-in-time rule, focusing on the relationship between treaties and statutes, see CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 461–67 (3d ed. 2008).

92. *See, e.g.*, United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) (analyzing whether the child-sex-tourism provision of the PROTECT act was consistent with international law).

93. *See* sources cited *supra* note 91 (discussing Congress's intent when it enacted the applicable statutes).

94. *See infra* Part IV.B.3 (discussing the presumption that Congress does not intend to violate international law).

under public international law.[95] These tend to include some or all of the following: nationality (when the subjects of regulation are the state's nationals), effects (physical or economic) within a state's territory, protective jurisdiction (based on harm to a state's security interests), passive personality (based on harm to a state's nationals), objective jurisdiction (based on a sufficient nexus of events to the state), and universal jurisdiction (applying to a very limited set of offenses, of which piracy is the paradigmatic example).[96]

This is not the place to discuss these categories in detail. For this Article's purposes, what is interesting is that a large portion of the situations in which states might choose to exercise extraterritorial jurisdiction fall into at least one of these categories. Moreover, courts that undertake an analysis of these jurisdictional categories tend to conclude that either a strong showing in one category or a weaker showing in multiple categories is sufficient to satisfy any international law requirements.[97]

The large number of fact situations encompassed by these jurisdictional categories means they tend to encourage, rather than discourage, a court from concluding that a statute applies extraterritorially.

B. *Antiextraterritoriality*

Antiextraterritoriality interpretive methods place a thumb on the scale against extraterritorial application. Part IV.B.1 discusses territorial theories of state power. Part IV.B.2 discusses the presumption against extraterritoriality, the doctrine at the center of most academic discussions of the territorial scope of U.S. federal law. Part IV.B.3 discusses the presumption that Congress does not intend to violate international law. This doctrine is often discussed together with the presumption against extraterritoriality. Part IV.B.4 discusses international comity, a doctrine based on the idea that states should at times refrain from doing things within their power in deference to the rights, interests, or sovereignty of other states.

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95. A recent summary is set out in CHARLES DOYLE, CONG. RESEARCH SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN LAW 12–14 (2007). For the classic statement of these jurisdictional categories, see Draft Convention on Jurisdiction with Respect to Crime, *in* 29 AM. J. INT'L L. 439, 445 (Supp. 1935) [hereinafter Draft Convention].

96. *See, e.g.*, Draft Convention, *supra* note 95, at 445; DOYLE, *supra* note 95, at 12. Territory (based on events within the state's territory) is typically included at the front of this list as the strongest basis for jurisdiction. It has been omitted from the list above because—unlike the other bases—it cannot logically serve a proextraterritoriality function.

97. In the United States, this analysis is usually undertaken as a subpart of a court's analysis of the presumption that Congress intends to comply with international law. *See infra* Part IV.B.3.

1. Territorial Theories of State Power

The most antiextraterritoriality interpretive method is the position that a state's power to apply its law is coextensive with—and limited by—its physical territory.[98] In its strongest form, this would include the position that a state's law cannot extend beyond its land or territorial waters. However, the United States has never applied the strongest form of such a territorial theory. Congress has long asserted some degree of legal authority over actions on the high seas[99] and over U.S. citizens abroad.[100]

2. Presumption Against Extraterritoriality

The second antiextraterritoriality interpretive method is the presumption against extraterritoriality. The presumption has been applied frequently but inconsistently. While often phrased in the form of a rule, it has in practice operated as a standard: it does not appear to dictate in advance the outcome of the analysis for many disputes. The Supreme Court has at times applied the presumption strictly,[101] and at times ignored it entirely.[102]

3. Presumption that Congress Does Not Intend to Violate International Law

The third antiextraterritoriality interpretive method is the presumption that Congress does not intend to violate international

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98. The classic statement of this is presented in Pennoyer v. Neff, 95 U.S. 714, 722–24 (1878). However, even in the *Pennoyer* era Congress exercised some extraterritorial authority. *See infra* notes 99–100 and accompanying text.

99. *See* Act of Apr. 30, 1790, ch. 9, §§ 8–13, 1 Stat. 112, 113–15 (1790) (criminalizing murder, robbery, and other certain acts committed on the high seas); *see also* U.S. CONST. art. I, § 8, cl. 10 (permitting Congress "[t]o define and punish Piracies and Felonies committed on the high Seas").

100. *See* Blackmer v. United States, 284 U.S. 421, 437–38 (1932); United States v. Bowman, 260 U.S. 94, 102 (1922). On the United States' extensive exercise of extraterritorial rights in China, see EILEEN P. SCULLY, BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942 (2001).

101. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010) (securities fraud); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (antidiscrimination); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (antitrust).

102. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S 764 (1993) (failing to mention the presumption against extraterritoriality in the majority opinion). The majority's failure to mention the presumption against extraterritoriality is made more striking by the dissent's explicit discussion of this same presumption. *See id.* at 814 (Scalia, J., dissenting) (discussing both the presumption against extraterritoriality and the presumption that Congress does not intend to violate international law). Of course, from the perspective of social-choice theory, this inconsistency is not surprising. *See* Easterbrook, *supra* note 6, at 830–31.

law. This requires either a determination or an assumption about what the international law of jurisdiction is. In the Supreme Court, this frequently takes the form of reliance on the Restatement (Third) of the Foreign Relations of the United States as either a statement of,[103] or a proxy for, the relevant international law.[104] The inquiry typically centers on the Restatement's "reasonableness" provision—a paradigmatic example of a standard.[105]

4. Comity

The term *comity* has been used to describe a broad set of circumstances under which a state refrains from applying its law to a situation involving foreign elements.[106] Within an individual state, the fact of exercising comity may be less important than the question of what substate actor makes the comity decision. Comity can be exercised by any of the main branches of government. This Article uses the term *legislative comity* to describe a decision by Congress not to extend a particular law to a fact situation (or type of fact situation) with foreign elements; *executive comity* to refer to a decision by the executive branch not to take an enforcement action in a fact situation with foreign elements; and *judicial comity* to refer to a decision by a court to decline to apply a law to a fact situation with foreign elements.[107]

As a general matter, legislative comity tends to be the most rule-like of the three. Congress can, of course, pass a private bill relating

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103. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (appearing to treat the Restatement as reflecting the relevant international law); *Hartford Fire*, 509 U.S. at 813 (same).

104. Justice Scalia expressly relied on the Restatement in *Hartford Fire*:

> I shall rely on the Restatement (Third) for the relevant principles of international law . . . . Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests."

509 U.S. at 818 (Scalia, J., dissenting).

105. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 403 (1987). The text of the "reasonableness" provision is set out *supra* note 20. On some of the problems created by § 403's interest-balancing approach, see generally Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 288–89 (1999).

106. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1179–81 (2007) (grouping the presumption that Congress intends to comply with international law, the presumption against extraterritoriality, the act-of-state doctrine, the foreign sovereign immunity doctrine, and more general application of the idea of comity together as the "Comity Doctrines").

107. *Cf. Hartford Fire*, 509 U.S. at 817–18 n.9 (Scalia, J., dissenting) (arguing for a distinction between the abstention-like "comity of courts" and an idea of "prescriptive comity," which is "exercised by legislatures when they enact laws").

to a specific fact situation. More frequently, however, Congress passes laws that explicitly limit the application of a statute in situations with certain foreign elements.

Executive comity can be rule-like or standard-like. When an executive agency acts through delegated rule-making authority, it is likely to act in a rule-like manner. When an executive agency makes a decision not to act in an individual enforcement situation, this is likely to be a standard-like exercise of comity.[108]

Judicial comity can also be rule-like or standard-like, depending on the manner in which the court makes its comity decisions. To the extent a court announces general, forward-looking rules divorced from particular facts, judicial comity can operate in a rule-like manner—clarifying how a statute should be read in the future. However, to the extent a court reaches fact-centered decisions—and especially to the extent those fact-centered decisions rest on weak or nonexistent distinctions from prior, similar cases with opposite results—the court acts in a standard-like manner. The more a court rests its comity decision on the factual details of particular cases, the more judicial comity begins to resemble an abstention doctrine rather than a method of statutory interpretation.[109]

C. *Territorially Neutral*

Territorially neutral interpretive methods neither favor nor disfavor extraterritorial application. Unlike the specialized doctrines discussed in the last two sections, many of these territorially neutral interpretive methods are broad theories of statutory interpretation. Part IV.C.1 discusses archaeological theories, which seek to determine the content of a statute by reference to the intent of the enacting legislature.[110] Part IV.C.2 discusses dynamic theories, which

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108. An exercise of comity is rule-like when it is structured to make outcomes possible to predict in advance. An exercise of comity is standard-like when the comity decision turns on the facts of particular situation. Legislative comity will typically be rule-like because it is exercised when a law is structured. Judicial comity will typically be standard-like because it involves a decision to abstain from applying the law in a particular fact situation. Executive comity can be rule-like or standard-like, because—in the modern administrative state—the executive has the opportunity to both issue regulations and exercise enforcement discretion.

109. *Cf. Hartford Fire*, 509 U.S. at 818 n.9 (Scalia, J., dissenting) (criticizing lower courts for exercising a type of judicial comity that functioned in effect as an abstention doctrine).

110. I borrow from William Eskridge the idea of dividing the leading statutory interpretation theories into "archaeological" and "dynamic" varieties. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9, 13 (1994). Eskridge credits Charles Curtis for the "archaeological" term. *Id.* I separately discuss Einer Elhauge's proposal for preference-eliciting default rules. These differ fundamentally from archaeological and dynamic theories because preference-eliciting default rules deliberately choose interpretations of statutes because they are the opposite of what

seek to determine the content of a statute by reference either to present-day conceptions of good policy or to present-day preferences of various institutional actors in the lawmaking and statutory interpretation process. Part IV.C.3 discusses preference-eliciting default rules, an aggressive statutory interpretation theory with a very different goal from most other methods. Part IV.C.4 discusses other, more general, common-law canons of construction.

1. Archaeological Theories

Searches for specific legislative intent or broad legislative purpose should not systematically favor or disfavor extraterritorial application. To the extent one accepts the idea of legislative intent, it requires a context-dependent evaluation of what some legislature (either current or past) collectively intended. Sometimes this will suggest extraterritorial application; other times it will not. In either situation, ample room remains for the interpreter to allow his or her own substantive views to color the search for legislative intent. Similarly, a search for broad legislative purpose of the type envisioned by the legal process school should not cut for or against extraterritoriality.

Textual analysis proves more difficult. This theory purports to be less context dependent, looking instead for general rules that can be applied mechanically to diverse fact situations. Whether textual analysis is proextraterritorial or antiextraterritorial depends primarily on the relevant baseline. As an empirical matter, most statutes do not address territorial scope. If the default rule is that statutes apply everywhere, textual analysis should be proextraterritorial. If the default rule is that statutes are territorially limited (as implied by the presumption against extraterritoriality), then textual analysis becomes an antiextraterritoriality interpretive method.

2. Dynamic Theories

Dynamic theories of statutory interpretation differ from archaeological theories in that they do not confine themselves to searching for the narrow (intentionalist), broad (purposive), or explicitly expressed (textualist) intent of prior legislatures. [111]

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the current legislature (or powerful groups in the electorate) would want. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 9–12 (2008).

111. On dynamic theories of statutory interpretation, see ESKRIDGE, *supra* note 110, at 9, and Stephen F. Ross, *The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning*, ISSUES LEGAL SCHOLARSHIP (2002), *available at* http://www.degruyter.com/view/j/ils.

Instead, dynamic theories focus on the application of statutes to two types of fact situations: those not envisioned at the time of the statute's promulgation[112] and those with a fundamentally different social or political meaning from that which existed at the time of statute's promulgation.[113]

In dealing with fact situations not envisioned by the enacting legislature, dynamic theories may focus on pragmatic reasoning. This could lead the interpreter to try to determine the best current policy.[114] Alternatively, it might lead the interpreter to imagine what the enacting legislature would have wanted, if it had—using current values—envisioned the relevant factual circumstances. [115] This inquiry differs from that imagined by purposive archaeological theories in that it imports current social and political values in understanding the purposes of the enacting legislature.[116]

An alternative method of dynamic statutory interpretation involves a more formalized game incorporating the "anticipated response" of various institutional actors.[117] Under this variety of dynamic theory, the various players in the interpretive process seek to satisfy their own policy preferences.[118] However, in choosing how far to go in seeking to satisfy their preferences, they incorporate the anticipated response of other institutional power centers.[119] In other words, an agency or court charged with interpreting a statute will go as far as it can go without provoking another institutional actor into blocking or overruling it. All else being equal, agencies will interpret statutes more aggressively when the legislature is controlled by the same political party as the executive. [120] Similarly, courts will interpret statutes more aggressively (in accord with their own policy preferences) when the composition of the legislature or the executive branch suggests it is unlikely that those aggressive interpretations will be overruled.[121]

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112. *See* ESKRIDGE, *supra* note 110, at 52.
113. *See id.* at 53.
114. *See id.* at 57.
115. *See id.*
116. The interpreter does not view the statutory text in isolation, but reads it in connection with the legislative history, statutory practicing precedents, and current norms and values. Thus, a clear text whose plain meaning is unreasonable and apparently unanticipated by the legislature may be interpreted to be consistent with that legislative history . . . or that purpose and current values . . . .

Id. at 56.
117. *See id.* at 74.
118. *See id.* at 74–80.
119. *See id.*
120. *See id.*
121. *See id.* at 74–80.

For purposes of this Article, the primary relevance of dynamic theories is that, like archaeological theories, they should not work systematically either for or against extraterritorial application. The first type of dynamic theory, concerned with changed factual circumstances, will in some instances work for and in some instances work against extraterritorial application. It is likely to work for extraterritorial application in situations where the regulatory problem that appears to be the focus of the statute has developed in such a way that is difficult to regulate through purely territorial authority.[122] It is likely to work against extraterritorial application in those situations where changes in state political and economic power suggest that the cost of extraterritorial application (either to the United States as a whole or to particular, politically influential groups) exceeds the likely benefits.

This second type of dynamic theory can also work for or against extraterritorial application. If other institutional actors are perceived to have a preference for extraterritorial application of the relevant statute, it will work in a proextraterritoriality manner. If other institutional actors are perceived to have a preference against extraterritorial application of the relevant statute, it will work in an antiextraterritoriality manner.

In understanding the anticipated-response variety of dynamic theory, it is most straightforward to focus on domestic institutional actors. To the extent foreign actors are considered, it is possible that an anticipated-response theory would function in a generally antiextraterritoriality manner. Experience within the realm of statutes classified as potentially extraterritorial standards suggests that foreign countries generally oppose the extraterritorial application of U.S. law. However, it is possible to anticipate situations where some institutional actors in foreign governments would appreciate extraterritorial application of specific U.S. statutes. For example, in countries with high levels of internal corruption, those actors in government opposed to corruption might favor aggressive enforcement of the FCPA. By reducing the supply of bribes available, the FCPA could help foreign government actors opposed to corruption mitigate their own principal–agent problems.[123]

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122. *See generally* JACK GOLDSMITH & TIM WU: WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006) (examining territorial authority in the context of the internet).

123. On bribery regulation as a principal–agent problem, see Adam I. Muchmore, *Private Regulation and Foreign Conduct*, 47 SAN DIEGO L. REV. 371, 402–03 (2010).

3. Preference-Eliciting Default Rules

Einer Elhauge has proposed that in certain cases, courts rely on preference-eliciting default rules.[124] These preference-eliciting default rules function in a manner opposite to that of most statutory interpretation theories. While most statutory interpretation theories seek to determine the intent of some past or present legislature, preference-eliciting default rules seek to choose an interpretation diametrically opposed to what the current legislature is likely to want.[125] The idea is to provoke the current legislature into acting to clarify its preferences in situations where the court is unable to determine those preferences through other means.

Preference-eliciting default rules should not work systematically either for or against extraterritorial application. To the extent that powerful groups with access to the legislative process are expected to prefer extraterritorial application, preference-eliciting default rules will work as an antiextraterritoriality interpretive method. To the extent that powerful groups with access to the legislative process are expected to oppose extraterritorial application, preference-eliciting default rules will work as a proextraterritoriality interpretive method. On balance, this approach to statutory interpretation should be territorially neutral, as different groups will favor or oppose extraterritorial application in different situations.

4. Other Canons of Construction

One final variety of territorially neutral interpretation methods is the use of common-law canons of construction (other than the two antiextraterritoriality canons discussed in Parts IV.B.2 and IV.B.3).[126] Karl Llewellyn famously observed that "there are two opposing canons on almost every point"—and that case outcomes were determined less by the canons themselves than by which canon the interpreting court chose to apply.[127] William Eskridge has

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124. Elhauge proposes that these preference-eliciting default rules be used when courts can determine neither the preferences of the current legislature nor the preferences of the enacting legislature. *See* ELHAUGE, *supra* note 110, at 9–12.

125. *Id.* at 12.

126. *See supra* Part IV.A–B.

127. Karl N. Llewellyn, *Remarks on the Theory of the Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950); *see also* Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012, 12:00 PM), http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism# (reviewing ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (making a similar criticism of the book's endorsement of "fifty-seven 'canons of construction,'" which Posner suggests are far more indeterminate than Scalia and Garner describe them to be).

supplemented Llewellyn's analysis with two important observations. First, courts often have many potentially applicable canons from which to choose.[128] Second, courts—especially the Supreme Court—can choose the "relative weight" of each canon and how it will interact with other potentially applicable canons.[129]

Eskridge divides the various common-law canons into three types: (1) "substantive canons" that set out "policy rules and presumptions";[130] (2) "textual canons" that set out "precepts of grammar, syntax, and logical inference";[131] and (3) "extrinsic source canons" that set out "rules of deference to the interpretations others have placed the statutory language."[132]

Two of the substantive canons discussed above were antiextraterritoriality interpretive methods: the presumption against extraterritoriality and the presumption that Congress intends to comply with international law. In addition to these, the canon of avoiding "interpretations that would render a statute unconstitutional"[133] could work in a systematically antiextraterritoriality manner if other constitutional provisions are interpreted to place constitutional limits on Congress's extraterritorial authority.[134]

The extrinsic-source canons are more straightforward. These canons, which consist primarily of requirements for deference to congressional, agency, or prior court interpretations of a statute, should not operate in either a proextraterritoriality or antiextraterritoriality manner. When prior interpretations have been proextraterritorial, these canons will favor the same. When prior interpretations have been antiextraterritorial, these canons will also do the same.

The textual canons should also be territorially neutral, but with the same baseline exception that applies to textualist archaeological

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128. ESKRIDGE, *supra* note 110, at 280–81.

129. *Id.*

130. *Id.* at 276; *see also id.* at 325–28 (listing substantive canons).

131. *Id.* at 276; *see also id.* at 323–24 (listing textual canons).

132. *Id.* at 276; *see also id.* at 324–25 (listing extrinsic-source canons). Eskridge lists extrinsic-source canons first, textual canons second, and substantive canons third—the order is altered here to make sense with the textual discussion that follows.

133. *Id.* at 325.

134. The Fifth Amendment Due Process Clause appears to be the constitutional provision most likely to be interpreted to impose such limits. However, the Fifth Amendment's role as a limit on extraterritoriality has been limited. *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (observing that the Supreme Court had neither adopted nor rejected the proposition that the Fifth Amendment Due Process Clause limits the extraterritorial reach of substantive federal law); *cf.* Boumediene v. Bush, 553 U.S. 723, 785 (2008) ("Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." (citations omitted)).

theories.[135] The textual canons tend to require courts to follow the plain meaning of the statutory text, to assume that including one thing means excluding other things, and similar interpretive assumptions. If the baseline is that statutes only apply within the United States (as suggested by the presumption against extraterritoriality), the textual canons will work in an antiextraterritoriality manner. However, if the substantive content of the relevant statute makes it seems necessarily extraterritorial to the court, the corollary to the plain meaning rule—that the plain meaning should not be applied when the text suggests an absurd result—makes textual canons function in a proextraterritoriality manner.

Figure 3, below, sets out examples of statutory interpretation methods falling into the three categories discussed in this Part (proextraterritoriality, antiextraterritoriality, and territorially neutral). The chart suggests that disagreement about the extraterritorial scope of statutes may be largely unrelated to the most politically charged disputes about statutory interpretation. In particular, the disagreement between those who advocate archaeological theories of statutory interpretation (generally associated with the political right) and those who advocate dynamic theories of statutory interpretation (generally associated with the political left) does not appear to dictate the choice between proextraterritoriality and antiextraterritoriality interpretive methods. While the presumption against extraterritoriality may, to a limited extent, be currently associated with Justices who advocate the textual version of the archaeological approach, it is possible to imagine the same presumption with very different political valence.[136]

135. *See supra* Part IV.C.1.

136. *Cf.* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870–71 (1993) (describing the changing political valence of ideas over time).

Figure 3—Three Types of Interpretive Methods

Proextraterritoriality	Antiextraterritoriality	Territorially Neutral

• Analysis of state "interests" (relaxed, impure derivative of Currie's "governmental interest analysis")
• Last-in-Time Rule (rule that Congress is not constrained by international law)
• Traditional "categories" of international jurisdiction (territory, nationality, effects, passive personality, universal jurisdiction)
	• Territorial theories of state power (*Pennoyer* era)
	• Presumption against extraterritoriality
	• Presumption that Congress does not intend to violate international law
	• Concept/doctrine of international comity
		• Most traditional methodologies of statutory interpretation
		  • Archaeological
		  • Legislative intent
		  • Purposivism
		  • Textualism
		• Dynamic/normative theories
		  • Pragmatism
		  • Law and economics (rational/behavioral/ public choice)
		  • Critical theories (race/class/gender)
		  • Preference-eliciting default rules
		• Most other canons of construction

V. PRECEDENT, THROUGH RULES AND STANDARDS

As a matter of legal doctrine, leading extraterritoriality precedents are difficult, and perhaps impossible, to reconcile. However, as a matter of practice, it does not appear that there is substantial uncertainty, except at the margins, about the territorial scope of U.S. federal law. This presents a puzzle—how does doctrinal conflict lead to relatively settled law in practice?

One obvious response is that this could happen if legal doctrine was not driving outcomes, either at the Supreme Court level or in the lower courts. The extreme realist version of this position—today associated with the attitudinal model of judging[137]—is that outcomes

137. On legal realism, see generally KALMAN, *supra* note 26. On the attitudinal model of judging, see generally Howard Gillman, *What's Law Got To Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 467, 486–87 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999)).

are instead driven by the political preferences of judges.[138] Yet this response does not seem to fully explain extraterritoriality decisions, which sometimes generate substantial consensus—at least for the ultimate result.[139] One possibility is that outcomes are being driven not by a political view, but by a jurisprudential one—by a preference for either rules or standards. This preference could be operating as a general matter[140] or in the specific context of extraterritoriality cases,[141] and could vary based on interaction with other institutional actors' preferences for rules or standards.

This suggestion may seem straightforward. However, existing literature does not seem to treat territorial scope in this direct manner.[142] Courts and academics tend to treat extraterritoriality as a jumbled area of law in need of rationalization and consistency.[143] This Article contends that existing decisions are better explained by using the rule/standard spectrum than by other, more complicated attempts at rationalization. Of course, this approach does not allow one to foresee with precision how any individual court will approach an extraterritoriality question.

The Supreme Court's decisions in extraterritorial antitrust cases provide a useful illustration of the role of rules and standards in extraterritoriality decision making. In *American Banana Co. v. United Fruit Co.*,[144] the Supreme Court refused—in a rule-like manner—to apply U.S. antitrust laws in private civil litigation between two U.S. banana companies operating in Latin America.

During the decades following the 1909 *American Banana* decision, the Supreme Court gradually retreated from the position that U.S. antitrust laws did not apply outside of U.S. territory.[145] It

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138. A version of this argument is frequently made with respect to the Supreme Court's *Aramco* decision. *See* ESKRIDGE, *supra* note 110, at 283; Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 180–84 (1992).

139. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (5 in majority, 3 concurring, 1 not participating, 0 dissenting); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (6 in majority; 1 concurring; 1 not participating, 0 dissenting). *But see* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (5–4 decision split on fairly typical lines); EEOC v. Arabian Am. Oil. Co., 499 U.S. 244 (1991) (5 majority; 1 concurring; 3 dissenting; split along fairly typical lines).

140. *See* Sullivan, *supra* note 21, at 112–21 (analyzing the degree to which individual Justices' general preferences for rules or for standards influenced the 1991 Supreme Court term).

141. *See infra* notes 144–57 and accompanying text.

142. The closest I have found is a recent article by Paul Stephan. *See* Stephan, *Extraterritoriality*, *supra* note 53, at 10, 15 (discussing the role of standards in a political-economy analysis of extraterritoriality).

143. *See, e.g.*, Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1020 (2011) (noting this phenomenon and citing relevant sources).

144. 213 U.S. 347, 357 (1909).

145. The Court did this not by overruling *American Banana*, but by distinguishing and narrowing it. First, the Court concluded in *United States v. Pacific*

was probably necessary for the Court to back away from *American Banana*, because many aspects of that case's reasoning are not easily compatible with domestic regulation of international business.[146] What is interesting, however, is that the Court conducted this backing away not by overruling *American Banana*, but by treating the territorial scope of the Sherman Act as a standard rather than a rule. In each of the relevant cases, the Court's conclusion that the Sherman Act applied rested in significant part on a determination that the relevant events had a sufficient connection to U.S. territory.

The modern era of international antitrust regulation began with the Second Circuit's decision in *United States v. Aluminum Company of America* (*Alcoa*) decision.[147] *Alcoa* was an antitrust case of

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& Arctic Ry. & Navigation Co. that rates charged on a rail and steamship route between Alaska and the mainland United States were subject to U.S. antitrust law because portions of the route were within U.S. territory. *See* 228 U.S. 87, 106 (1913) (concluding that U.S. antitrust law could be applied to portions of steam and rail transportation route that were in the United States). Second, the Court concluded in *Thomsen v. Cayser* that rates charged on a steamship route between New York and South Africa were subject to antitrust law because the alleged cartel "affected the foreign commerce of this country and was put into operation here." 243 U.S. 66, 88 (1917) (citing *Pacific & Arctic*, 228 U.S. 87) (concluding that U.S. antitrust law could be applied to a steamship transportation route between the United States and South Africa). Neither *Pacific & Arctic* nor *Thomsen* made any reference to the *American Banana* decision, though both cases directly addressed the territorial scope of U.S. antitrust law. *Thomsen*, 243 U.S. at 88; *Pacific & Arctic*, 228 U.S. at 106. Third, the Court explicitly distinguished *American Banana* in *United States v. Sisal Sales Corp.* 274 U.S. 268, 275–76 (1927). In *Sisal*, the Court faced a situation not unlike *American Banana* in that it involved U.S. companies monopolizing trade in a product produced in Latin America. However, the *Sisal* court distinguished *American Banana* by concluding that in *Sisal*—unlike *American Banana*—the relevant conspiracy was entered into in the United States. For a general overview of these developments, see Kramer, *supra* note 138, at 190–92.

146. For example, the Court in *American Banana* stated:

> Law is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense.

213 U.S. at 357; *see also id.* ("In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue."). On the degree to which modern regulation of international business depends on threats directed toward persons who may not live within the immediate power of the court, see Adam I. Muchmore, *International Activity and Domestic Law*, 1 PENN ST. J.L. & INT'L AFF. 363, 364–67 (2012) (discussing extraterritorial regulatory programs—in the United States, the European Union, and China—based largely on the ability to condition market access on compliance with regulatory requirements).

147. 148 F.2d. 416 (2d Cir. 1945).

tremendous political and economic importance.[148] Perhaps because of the case's importance, the Supreme Court was unable to secure a quorum of six Justices necessary to decide the case and transferred it to the Second Circuit for a final decisions.[149] In the Second Circuit, Judge Learned Hand concluded that a foreign conspiracy with economic effects in the United States was subject to U.S. antitrust law.[150] *Alcoa's* adoption of the economic-effects doctrine set the stage for deep conflicts between the United States and its major trading partners during the Cold War era.[151]

Nearly forty years passed between *Alcoa* and the Supreme Court's approval of extraterritorial application of the Sherman Act in *Hartford Fire Ins. Co. v. California.*[152] During this time, the lower courts struggled with a series of difficult questions of foreign and economic policy. Some decisions dealt narrowly with specific fact situations, while some tried to set out rule-like propositions. Perhaps most famously, *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* and its progeny set forth a forward-looking standard—a highly indeterminate, multi-factor test—that permitted courts to take account of virtually any factual or policy circumstance.[153] The

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148. *See* WYATT WELLS, ANTITRUST AND AMERICAN BUSINESS ABROAD 59–62 (2002) (describing the relationship of the *Alcoa* case to wartime demands for aluminum following the Japanese attack on Pearl Harbor).

149. United States v. Aluminum Co. of Am. (Alcoa), 64 S. Ct. 73, 73 (1943) (finding that disqualification of four Justices prevented a quorum); United States v. Aluminum Co. of Am. (Alcoa), 64 S. Ct. 1281, 1281 (1944) (per curiam) (transferring the case to the Second Circuit for final disposition).

150. *Alcoa*, 148 F.2d 416 ("Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.").

151. Perhaps the classic modern area of conflicts of jurisdiction is antitrust law. The United Kingdom, Australia, and some other important friendly countries simply do not accept the "effects test" as a legitimate basis of jurisdiction to regulate economic conduct under international law. The effects test was initially enunciated in Judge Learned Hand's 1945 *Alcoa* decision and is the first step in the jurisdictional analysis performed by Federal courts today. It applies U.S. antitrust law to conduct abroad having substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce.

Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 77 AM. SOC. INT'L L. PROC. 370, 372 (1983).

152. 509 U.S. 764 (1993). On the Supreme Court affirming some antitrust cases with foreign elements without explicitly approving of *Alcoa*-style extraterritorial application of the Sherman Act, see Kramer, *supra* note 138, at 193.

153. 549 F.2d 597 (9th Cir. 1976). The court set out the following standard:

> What we prefer is an evaluation and balancing of the relevant considerations in each case in the words of Kingman Brewster, a "jurisdictional rule of reason." . . .
>
> . . . .

Timberlane factors found their way, somewhat modified, into the Restatement (Third) of Foreign Relations of the United States.[154]

The Restatement in turn played a role in the Supreme Court's two recent international antitrust cases, *Hartford Fire*[155] and *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*[156] To many observers, these decisions seemed to rest on conflicting theories.[157]

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of businesses or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. A court evaluating these factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. Nationality is another; though foreign governments may have some concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. Having assessed the conflict, the court should then determine whether in the face of it the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction.

Id. at 613–15. For an example of a well-known case following *Timberlane*, see Mannington Mills, Inc. v. Congoleum Corp. 595 F.2d 1287 (3d Cir. 1979).

154. This modified version of the *Timberlane* standard was incorporated into § 403(2) of the Restatement (Third) of Foreign Relations of the United States. The text of § 403(2) is set out *supra* note 20.

155. 509 U.S. § 764 (1993).

156. 542 U.S. § 155 (2004).

157. In *Hartford Fire*, Justice Souter, writing for the Court, refused to engage in the standard-like balancing approach of *Timberlane* and the Restatement (Third). 509 U.S. at 798. The majority determined that standard-like balancing was not required because the defendants had not made a showing that complying with U.S. law would require them to violate British law. *Id.* at 798–99. A dissent by Justice Scalia—normally a proponent of bright-line rules, *see* Scalia, *supra* note 21, at 1179—argued that the Court was required to engage in standard-like balancing in this situation. 509 U.S. at 814–15 (Scalia, J., dissenting). Justice Scalia reached this result in five steps. First, he asserted that prior Supreme Court decisions had overcome the presumption against extraterritoriality with respect to U.S. antitrust law. *Id.* at 814. Second, he asserted that, in addition to the presumption against extraterritoriality, the Court was required to apply the presumption that Congress intends to comply with international law. *Id.* at 814–15. Third, he assumed without deciding that the Restatement (Third) of Foreign Relations of the United States—including § 403(2)—set out the relevant rules of international law. *Id.* at 818. Fourth, he recast several decisions appearing to apply judicial comity (which he calls "the comity of courts") as instead applying legislative comity (which he calls "prescriptive comity"). *Id.* at 817–20. Finally, Justice Scalia concluded that the Sherman Act should not be construed as applying to the *Hartford Fire* facts. *Id.* at 819. In sum:

> Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. Great Britain has established

During this entire period—over half a century since *Alcoa*—the Sherman Act functioned in effect as a potentially extraterritorial standard. It applied in situations where the facts were sufficiently tied to the United States; it did not apply in situations where the facts were not sufficiently tied to the United States.

It has appeared far more likely to apply when the United States government brings an enforcement action, but even that may not be an outright rule. The rarity with which the government has brought criminal antitrust claims against foreign nationals suggests some desire not to risk bringing a weak case that could result in a negative precedent.[158]

A. *Rules, Standards, and Extraterritoriality Precedents*

Leading precedents in antitrust, securities, and employment cases suggest that the choice between rules and standards plays a significant role. In antitrust, the Sherman Act was passed during the heyday of territorial theories of state power.[159] Early decisions confined the antitrust laws to U.S. territory.[160] However, the famous

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> a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a "heavy interest in regulating the activity["] . . . . Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

Id. (footnotes omitted) (citations omitted) (internal quotation marks omitted).

Eleven years later, the Supreme Court handed down its *Empagran* decision. Justice Breyer, writing for the Court, began with a slight rephrasing of the presumption that Congress does not intend to violate international law: "[T]his court normally construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). For this proposition, Justice Breyer cited, among other sources, Justice Scalia's *Hartford Fire* dissenting opinion. *Id.* Justice Breyer then proceeded to conduct the type of standard-like balancing rejected by the *Hartford Fire* majority (but recommended by Justice Scalia's *Hartford Fire* dissent). *Id.* For comments by other observers, see, e.g., *Developments in the Law—Extraterritoriality: V. Comity and Extraterritoriality in Antitrust Enforcement*, 124 HARV. L. REV. 1269, 1272–73 (2011); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 321–23 (2007); Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Reach of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 218–220.

158. *Cf.* United States v. Nippon Paper Indus. Co., 109 F.3d 1 (1st Cir. 1997) (reversing the district court judgment and reinstating criminal antitrust claims against foreign company).

159. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722–24 (1878) (territorial theory of personal jurisdiction); RESTATEMENT (FIRST) OF CONFLICTS OF LAW (1934) (territorial theory of choice of law); Kramer, *supra* note 138, at 187–89 (describing how territoriality was the cornerstone of the political and legal framework during this time period).

160. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 359 (1909) (finding that the complaint did not state a cause of action because "[a] conspiracy in this

1945 *Alcoa* decision asserted broad authority—in a somewhat rule-like manner—over foreign conspiracies with effects in the United States.[161] Foreign companies and their governments fought back, and by the late 1970s a number of federal circuit courts had shifted to standards in extraterritorial decision making.[162] These standards went beyond determining whether a U.S. court has jurisdiction under *Alcoa's* effects test to whether the court *should* exercise that jurisdiction in light of factors such as international comity and fairness, the potential effects on U.S. diplomacy and foreign policy, and the relative importance of the allegedly unlawful conduct domestically compared to abroad.[163] The Supreme Court stayed out of fights over the extraterritorial scope of the Sherman Act until the *Hartford Fire* decision in 1993, where it gave what might be considered a qualified endorsement of the use of standards to determine the scope of the Sherman Act.[164] A broader endorsement followed with the *Empagran* decision in 2004.[165] The opposing outcomes of the *Hartford Fire* and *Empagran* analyses, which have appeared contradictory to many observers, make more sense when viewed simply as decisions holding that a standard, rather than a rule, should be used to decide the territorial scope of U.S. antitrust law.[166]

Moving from antitrust to securities law, there appears to have been a period of time where the presumption against

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country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law").

161. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443–45 (2d Cir. 1945). This is rule-like in that Judge Learned Hand indicates that U.S. laws apply abroad as long as Congress intends that they do so. He does not include any exception for reasonableness, balancing of interests, etc. *See id.*

162. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (applying a standard-like approach); Mannington Mills, Inc. v Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979) (adopting *Timberlane*'s standard-like approach);.

163. *See, e.g.*, *Mannington Mill*, 595 F.2d at 1301 (urging U.S. courts not to "ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power" should be taken into account when deciding whether to exercise jurisdiction in matters involving foreign nations); *Timberlane*, 549 F.2d at 597 (providing an array of factors a court should consider when deciding whether to exercise "extraterritorial jurisdiction").

164. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (declining to address whether a comity-based exception exists to the reach of the Sherman Act, but concluding that if such an exception existed, it would not apply to the facts then before the Court). This is a qualified endorsement because it did not outright reject standard-based balancing, but concluded it was not necessary on the facts of the case. For additional information on *Hartford Fire*, see *supra* note 157.

165. *See* 542 U.S. 155, 173–74 (2004) (using comity analysis to conclude that the Sherman Act, as modified by the Foreign Trade Antitrust Improvement Act, did not apply to foreign price fixing insofar as it affected prices in foreign markets).

166. *See supra* note 157 (detailing the analyses performed by the *Hartford Fire* and *Empagran* courts).

extraterritoriality was applied fairly generally as an antiextraterritoriality interpretive rule.[167] However, in the late 1960s and early 1970s, the Second Circuit switched to a standard-based approach, concluding that it would apply the antifraud provisions of the securities laws to transactions that had significant effects on U.S. markets [168] or that involved significant conduct in the United States.[169] This combination of an "effects test" and a "conduct test"[170] (with either being independently sufficient to sustain extraterritorial application) was adopted with some variation by several other circuits.[171] While exact formulations differed, it appears that each was generally applied as a policy-oriented balancing test.[172] This balancing came to an end with the recent *Morrison v. National Australia Bank Ltd.* decision, which returned to an antiextraterritoriality interpretive rule for the U.S. securities laws.[173] Congress responded with what is apparently a partial overruling of *Morrison* in the Dodd–Frank Act.[174]

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167. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010) (making this observation with respect to the U.S. District Court for the Southern District of New York).

168. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) ("We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from *the effects of improper foreign transactions* in American securities." (emphasis added)).

169. Conduct within the territory alone would seem sufficient from the standpoint of jurisdiction to prescribe a rule. It follows that when, as here, there has been *significant conduct within the territory*, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.

Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (original emphasis omitted and emphasis added).

170. *Morrison*, 130 S. Ct. at 2879 (internal quotations omitted).

171. *See id.* at 2880 ("Other Circuits embraced the Second Circuit's approach, though not its precise application.").

172. *Id.*

173. *See id.* at 2880–81 (finding the criticisms put forth regarding the "unpredictable and inconsistent application" of the Securities and Exchange Act to transnational cases justified and returning to the "presumption against extraterritoriality"). The *Morrison* decision did not outright prohibit extraterritorial application of U.S. law. It simply reaffirmed that the Supreme Court—at least the one that existed at the time of the *Morrison* decision—intended to apply the presumption against extraterritoriality as a strict clear-statement rule. *See id.* at 2881 ("Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.").

174. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862–65 (2010). The provision purports to overrule *Morrison* with respect to suits brought by the U.S. Department of Justice and the U.S. Securities and Exchange Commission, but not by private plaintiffs. Differing views have been expressed as to whether § 929P was drafted in a manner that will in fact accomplish this purpose. *Compare* Richard W. Painter, *The Dodd-Frank*

In employment law, an early case applying an antiextraterritoriality interpretive rule[175] gave way to standards in the 1950s.[176] In *Lauritzen v. Larsen*, a Jones Act case involving an injured seaman, the Court applied a general balancing test to determine that Danish rather than U.S. law applied to a maritime tort.[177] In *Romero v. International Terminal Operating Co.*, the Court purported to apply *Lauritzen*, but adopted the more rule-like proposition that claims between a seaman and his home-country employer should be governed by the law of their common domicile.[178] A switch back to standards followed in *Hellinic Lines v. Rhoditis*, with the Court emphasizing that the *Lauritzen* test was "not a mechanical one" and that the factors it listed were "not intended as exhaustive."[179] The Court returned to the more rule-like presumption against extraterritoriality in the 1991 *EEOC v. Arabian American Oil Company* (*Aramco*) case, but Congress responded by substituting an extraterritorial rule for the Supreme Court's decision reading U.S. antidiscrimination law as a territorially limited rule.[180] More simply, Congress indicated that it was rebutting the presumption against extraterritoriality for U.S. citizens working for U.S. companies abroad.[181]

Looking at the antitrust, securities, and employment cases together, it appears that the use of standards has been the dominant approach to the Court's decisions on the extraterritorial scope of U.S. law. While there is a contingent on the Court with a preference for antiextraterritoriality interpretive rules (victorious in *Aramco* and *Morrison*), those rules effectively lose their rule-like character when not applied consistently. A situation in which it is impossible to predict ex ante whether an outcome-determinative rule will be

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Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?, 1 HARV. BUS. L. REV. 195, 229 (2011) (suggesting that § 929P may not succeed in partially overruling *Morrison*), *with* Stephan, *Extraterritoriality*, *supra* note 53, at 14 n.20 (speculating that courts will overlook any poor drafting in § 929P and apply it as partially overruling *Morrison*).

175. N.Y. Cent. R.R. Co. v. Chisholm, 268 U.S. 29, 31–32 (1925) (applying the presumption against extraterritoriality).

176. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959) (using the standards established in *Lauritzen*); Lauritzen v. Larsen, 345 U.S. 571 (1953) (taking into account multiple factors to determine the applicable law).

177. *See Lauritzen*, 345 U.S. at 591–93 (applying a general balancing test similar to the New York weighing-of-contacts approach in choice of law).

178. 358 U.S. at 384.

179. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308–09 (1970).

180. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077 (1991) (amending the "DEFINITION OF EMPLOYEE" in the Civil Rights Act of 1964 and the Americans With Disabilities Act of 1990 to include: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States").

181. *See id.*; *see also* ESKRIDGE, *supra* note 110, at 283 (describing how the *Aramco* decision was overridden by Congress less than one year later).

applied is effectively a standard. Accordingly, the Court's recent *Morrison* decision does not demonstrate a return to rules in Supreme Court extraterritoriality decision making.[182] That will not occur until the Court demonstrates that the rule purportedly announced in *Morrison* will govern in some identifiable subset of future cases.

B. *The Extraterritoriality Spectrum*

Another reason for the tendency to use standards in extraterritoriality cases is that the fact situations that arise lend themselves to this type of analysis. The question of whether a fact situation should be treated as extraterritorial is difficult to conceptualize in a binary manner without arbitrary reliance on what Brilmayer and Anglin call (in the domestic choice-of-law context) a "single-factor trigger."[183]

When private actors are going about their daily business, they are frequently engaging in transactions that involve a combination of domestic and foreign actors and a combination of activities that can be categorized as domestic, foreign, and—as is often the case with cross-border communications—somewhere in between. When a dispute arises, the question of whether it is foreign or domestic likely depends on which of the actors originally involved in the transaction are now involved in the dispute and on which of the various activities involved in the transaction or series of transactions relate to the dispute. In other words, real-life situations exist on a spectrum between those that can be categorized as purely domestic and those that can be categorized as purely foreign/extraterritorial. (See Figure 4, below.)

Purely domestic fact situations are easy—U.S. domestic laws apply. Purely foreign situations are not easy, but arise less frequently. Even extraterritorial rules may not purport to apply to purely foreign fact situations, and it is rare for a defendant in a purely foreign dispute to be subject to personal jurisdiction in the United States.[184] But the vast majority of situations that arise in U.S. courts fall somewhere in between.

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182. On the rule adopted in *Morrison*, see *supra* note 173 and accompanying text.

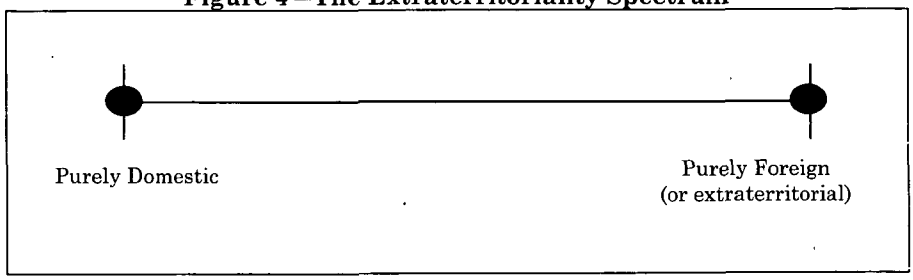
183. *See* BRILMAYER & ANGLIN, *supra* note 52, at 1146–47. In conflict of laws more generally, there is a long-standing tension between focusing on the location that has the strongest connection to the parties to the litigation (typically residence, domicile, place of business, or place of incorporation) and focusing on the location that has the strongest connection to the events that led to the particular dispute (place of accident, place of contracting, location of property, or place where a marriage is celebrated). *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 17–18 (1991)).

184. The Alien Tort Statute may be an exception, as it does not appear to require a connection to the United States. *See* 28 U.S.C. § 1350 (2006) ("The district

Up to this point, the wide variations in potential situations that can arise has prevented a consensus from forming on any set of rule-like criteria for determining either when a situation crosses over from "domestic" to "foreign" or when a "foreign" case has enough domestic ties to make application of U.S. law appropriate.

Accordingly, a significant impetus for the continuing presence of standards in U.S. extraterritoriality case law is the wide variation in fact situations that can arise. This structural classification problem arises even when looking at extraterritoriality cases from a purely doctrinal perspective. The problem is compounded when variations in state political, economic, and military power are brought into the equation.

Figure 4—The Extraterritoriality Spectrum



C. *Plaintiffs, Defendants, and Extraterritorial Regulation*

Whatever their general views on the relative desirability of rules and standards, institutional actors may have specific preferences for rules or standards in extraterritoriality decision making. A major reason for this is that extraterritorial application of U.S. law systematically favors plaintiffs in private civil litigation. As discussed earlier, almost all Supreme Court decisions on extraterritoriality matters have been made in cases when one private party sues another private party.[185] They all involve private rights of action under federal regulatory schemes. Partly for jurisdictional reasons, courts faced with a lawsuit under federal antitrust, securities, or employment law do not engage in the familiar choice-of-law process

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courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

185. The one notable exception was the Supreme Court's nondecision in the *Alcoa* case—where four Justices recused themselves and the Court, unable to secure a quorum, was forced to transfer the case back to the Second Circuit for a decision. Writing for the Second Circuit panel, Judge Learned Hand found in favor of the plaintiff—which happened to be the U.S. government—on the extraterritoriality issue. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

that courts (state or federal) use when faced with a case in torts, contracts, or other common-law field.

In those common-law fields, courts are faced with deciding which of two or more bodies of law to apply. For example, a court faced with a tort suit involving two Pennsylvania residents who got into a car wreck in Canada would have to choose whether to apply Pennsylvania tort law or the tort law of the relevant Canadian province. By contrast, a court faced with a suit under U.S. federal regulatory law involving events in Canada will not make a decision whether to apply U.S. or Canadian law. It will instead determine whether to apply U.S. law or dismiss the case.[186]

The question of whether U.S. law applies to extraterritorial activity is completely separate from the question of whether another court could apply some other body of law to that activity. It also means that a decision of a U.S. court to apply U.S. law extraterritorially is extremely unlikely to help the defendant.[187]

The pro-plaintiff bias created by the U.S-law-or-dismiss choice-of-law decision is compounded by both structural aspects of U.S. litigation and specific remedies included in frequently litigated regulatory statutes. Structurally, plaintiffs have several advantages in U.S. courts that they enjoy in few other court systems. These include broad discovery provisions, the "American rule" that the loser does not pay the winner's attorney's fees, the ability to bring litigation under contingent-fee arrangements, and the ability to obtain punitive damages. Beyond these pro-plaintiff provisions, some statutes structured as potentially extraterritorial standards have damage provisions that incentivize private litigation. The treble damages provision of the antitrust laws provides perhaps the best-known example.

Given that extraterritorial application of U.S. law carries these pro-plaintiff consequences, institutional actors who have reservations about the plaintiff versus defendant balance in U.S. litigation may be disinclined to see broad regulatory statutes interpreted as applying extraterritorially in a rule-like manner. However, those same institutional actors might also be disinclined to completely remove extraterritorial scope from federal regulatory statutes. This might be the case, for instance, if they believed territorially limited application

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186. *See generally* Brilmayer & Norchi, *supra* note 134, at 1232 (observing this differing treatment and noting that it cannot be fully explained by the limited jurisdiction of federal courts).

187. It would appear that the only possible benefit would be the potential preclusive effect that a U.S. court's judgment in favor of the defendant might have in later proceedings. However, it seems relatively unlikely that a foreign court would conclude that a judgment of nonliability under U.S. regulatory law would preclude liability for regulatory proceedings under foreign law.

of the statute might disadvantage U.S. companies vis-à-vis their foreign competitors.

VI. STRUCTURING LEGAL REQUIREMENTS: RULES, STANDARDS, AND LEGISLATIVE DELEGATION

Having examined the role that the distinction between rules and standards has played in extraterritoriality precedents in the previous Part, this Part examines the way basic incentive structures are likely to influence institutional preferences for rules or for standards. This analysis proceeds from a consequentialist perspective founded in public-choice theory. Accordingly, institutional preferences are assumed not to exist separately from the preferences of their individual members, and individual members are assumed to act in a way that maximizes their individual welfare.

A. *Instrumental Perspectives and Nonrepeat Players*

From this public-choice perspective, support by nonrepeat players for either rules or standards may depend significantly on instrumental considerations. Once involved in a dispute, the basic preference ordering for individuals is likely to be: (1) rule I like/rule that helps me; (2) standard; (3) rule I don't like/rule that hurts me. Faced with a legal provision that could be interpreted as either a rule or standard, an individual will favor a rule if the rule-like interpretation will help him but will favor a standard if the rule-like interpretation is unlikely to help. In other words, arguing for a standard is a classic strategy for situations where a rule-like interpretation is unfavorable.

B. *Repeat Players, Regulators, and Principal–Agent Problems*

The preference ordering works out differently for repeat players and for individuals charged with responsibility for controlling the acts of others. Repeat players are concerned less with the outcome of an individual dispute than with the aggregate outcome of all current and future disputes.[188] Accordingly, repeat players must consider not only how a rule or standard will influence the current dispute, but also how it will influence foreseeable future disputes.

Similarly, those with regulatory responsibility must consider how a rule or standard will influence foreseeable future cases. This is where the classic advantages and disadvantages of each legal form become relevant. Rules provide certainty and reduce principal–agent

188. With future disputes discounted to their present value.

problems, but have high upfront costs and can produce arbitrary results. Standards provide flexibility, as well as justice in the individual case, but reduce certainty, increase principal–agent problems, result in high decision costs at the point of application, and can create the appearance of like cases not being treated alike.

Whether a regulator prefers rules or standards for particular regulatory areas will depend in part on a judgment about whether rules or standards offer more efficient regulatory options for the particular regulatory area. However, it may also depend in significant part on the regulator's worldview. A regulator preferring certainty and equality before the law will likely lean toward rules. A regulator preferring justice in each individual case will likely lean toward standards.

Finally, a regulator who dislikes—but is unable to change—the content of the rule will prefer a standard. In this way, standards are a classic form of compromise. Two sides that want diametrically opposed rules will often agree on a standard. This is both a way of moving past an issue that could bar a more important agreement and a way of delegating the choice of outcomes to a future decision maker instead of determining them in advance.

C. *Optional Delegation of Legislative Authority*

The decision between rules and standards takes on an additional level of complication in a multibranch government. In the U.S. federal system, legislators have three basic choices on the rule/standard spectrum: (1) they can structure a requirement as a rule, preserving maximum legislative control; (2) they can structure a requirement as a standard, delegating the process of filling in details to the judiciary; or (3) they can delegate the process of filling in details to the executive, allowing the relevant agency to promulgate regulations using whatever mix of rules and standards it deems appropriate.

At first blush, it might seem that most legislators would prefer to choose option one, structuring legal requirements as rules in order to preserve maximum legislative control. But this approach runs up against several costs. Rules are more costly than standards to draft, as they require anticipation of possible fact situations in advance. Rules are also likely to be more costly to pass, because—to the extent that there are those that the chosen rules disfavor—opponents are more likely to mobilize against a rule that will always disfavor them than against a standard that will sometimes disfavor them. Rules also place responsibility—for good or for ill—on the legislators who voted for them. Finally, statute-based rules risk locking in a policy that a legislator (or the legislator's constituents) might not like as much in the future as in the present.

These drawbacks should in some cases lead the legislator to choose to delegate the details of legal requirements to either the

judiciary or the executive. A delegation to the judiciary requires the legislature to structure the statute as a standard, but permits the judiciary to fill in—on a case-by-case basis—the details with either rule-like or standard-like requirements. A delegation to the executive is also likely to be done through a statute structured as a standard, which typically leads the executive to promulgate a set of regulations combining rule-like and standard-like requirements.

A legislator's decision between situations in which the cost of a statute-based rule are worthwhile and situations in which a standard is preferable (delegating to the executive or the judiciary) is likely to depend, in significant part, on the way those two other branches are expected to exercise discretion. A delegation to the executive is more predictable the longer it is until the next presidential election. Beyond the duration of the current presidential term, however, a delegation to the executive is highly unpredictable.

Delegation to the executive also empowers different decision makers in different interest groups as compared to a rule-like requirement in the statutory text. Even when writing a rule in the statutory text, a member of Congress does not preserve power for himself, but for a future legislative majority. Changing a statute-based rule requires following a particular procedural path, typically empowering members of Congress with gatekeeping roles (committee chairs and party leaders) to exercise significant influence on whether a change is made and the content of any such change. This also empowers those lobbying groups who are effective in influencing large groups of Congress members—most likely those with deep pockets or significant grassroots support in key congressional districts.

By contrast, delegation to the executive establishes a different path for legal change. This instead puts the power to determine the content of law in the hands of career bureaucracies working under the direction of political appointees.[189] This empowers lobbying groups effective in influencing the regulatory process.

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In the U.S. constitutional structure, there is, of course, always a give and take between the three branches. Any contested application of the law requires a court proceeding, so the judiciary will have some interpretive role—even with rule-like requirements—in borderline situations. A court sufficiently convinced that a rule is harsh, unfair, or not sufficiently in the public interest can use aggressive judicial interpretation to transform seemingly rule-like requirements into standards. This is amply illustrated by the Supreme Court's First

189. Although the dynamic will of course vary somewhat between statutorily independent and nonindependent agencies, the overall idea is the same.

Amendment jurisprudence, which has repeatedly transformed requirements that are at least arguably rule-like into standards.[190]

Similarly, the executive retains some authority to influence the degree to which a rule-like statutory requirement affects primary behavior. To the extent the executive is given enforcement authority, it can choose to enforce a statute in any manner, from aggressively to not at all.

D. *Mandatory Delegation of Enforcement Authority*

In addition to authority to fill in the details of substantive requirements, legislators must also make another delegation decision. They must choose whether to delegate enforcement authority to the executive, to private parties, or to some combination of the two.

The result of the decision to delegate enforcement authority to the executive is, like a delegation of legislative authority, proportionally more predictable the further it is until the next presidential election. It can, however, also result in a statute being enforced very selectively or not at all because of the substantial discretion the executive has in determining how to utilize its enforcement resources.[191] A delegation to the executive also puts enforcement costs on the government and is likely to result in a lower level of enforcement than if private parties are also empowered to bring enforcement actions.

A decision to delegate enforcement authority in whole or in part to private parties results in a very different enforcement scheme. This delegation occurs by giving injured parties the authority to file a civil lawsuit to enforce the statute's provisions.[192] In some ways, this approach creates a highly predictable enforcement regime. Private parties—especially those operating for profit—are likely to respond to

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190. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Despite the rule-like nature of these provisions, the Supreme Court has used standard-like balancing tests in free-speech cases. *See, e.g.*, Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'r, 447 U.S. 557, 563–64 (1980) (setting out a standard-like balancing test for commercial-speech cases); Schneider v. New Jersey, 308 U.S. 147, 151 (1939) (setting out a standard-like balancing approach in handbill distribution cases); *see also* Aleinikoff, *supra* note 37, at 944 & n.3 (noting the role of standard-like balancing tests in free-speech cases); Schlag, *supra* note 37, at 394–98 (same).

191. *See* Heckler v. Chaney, 470 U.S. 821, 837–38 (1985) (concluding that the Administrative Procedure Act did not provide for judicial review of an agency decision not to take enforcement action).

192. These have come to be known as "private attorney general" provisions. *See generally* Hannah Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Adjudication*, 26 YALE J. INT'L L. 219 (2001) (examining the role of the private attorney general in international litigation).

incentives and file suits when they believe the benefits exceed the costs. Delegation of enforcement to private parties is also a way of disconnecting enforcement policy from the political control of the executive.

E. *Interest Groups and the Rule/Standard Decision*

Another factor that could contribute to the persistence of standards may relate to interest groups concerned with extraterritorial regulation. A comprehensive interest-group analysis goes beyond the scope of this Article, but the discussion of two important interest groups—domestic businesses and domestic lawyers—should offer the flavor of the way interest-group pressures can intersect with the distinction between rules and standards on extraterritoriality. Here standards play two primary roles: (1) as a compromise between those who favor and those who oppose extraterritorial regulation in a particular area and (2) as a factor that can raise litigation costs in a way that benefits defendant-side lawyers and harms plaintiff-side lawyers.[193]

1. Business Groups

Because extraterritorial application of U.S. law operates in a pro-plaintiff manner, business groups are likely to oppose extraterritorial application of U.S. securities law. This is because businesses are more likely to be defendants than plaintiffs in securities fraud actions.[194]

The case is more equivocal with respect to U.S. labor and employment law. Business groups are more likely to find themselves as defendants rather than plaintiffs in employment and labor cases, but that may not be their only concern. In addition to individual defendants, business groups are concerned with the relative labor costs they pay vis-à-vis their foreign competitors. Domestic business groups are already required to comply with U.S. law in their U.S. operations, so their main vulnerability to extraterritorial labor and employment suits involves employees (U.S. citizen and alien) in their foreign operations. To the extent that businesses already comply with U.S. labor and employment laws in their domestic and foreign operations, they may see extraterritorial application of U.S. law as something that would impose costs on their competitors but cause them little harm.

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193. Plaintiff-side lawyers working on hourly fees (which, in the United States, is most likely to be those representing large corporate entities) may often face incentives closer to those identified in this discussion with defendant-side lawyers.

194. A significant exception would be companies (especially privately held companies) that purchase securities of other companies as part of their normal business.

The situation differs with respect to antitrust laws. U.S. businesses know they are subject to U.S. antitrust law, both in their domestic and in their foreign operations. They also know that many of their competitors operate in places where antitrust laws are weak, nonexistent, or largely unenforced.[195] Accordingly, U.S. businesses are far more likely to find themselves as plaintiffs in antitrust cases than in securities or employment cases.[196] Moreover, even those businesses that do not find themselves as antitrust plaintiffs may benefit from having their foreign competitors subject to a regulatory scheme equivalent to their own.

In other words, businesses in the United States might have a very different view about the extraterritorial application of antitrust law than about the existence of antitrust law itself. Although there are almost certainly business groups who would prefer not to have any U.S. antitrust law at all, those with significant operations in the United States should typically prefer that—if antitrust law is going to exist—it apply to foreign competitors as well.

2. Lawyers

Another interest group highly relevant to extraterritoriality lawmaking is the legal profession. Lawyers may be involved in lobbying in two primary capacities. They may lobby on behalf of their own financial interests as a profession, and they may be hired to lobby on behalf of their clients.

Extraterritorial application of federal regulatory law should generally favor the interests of U.S. lawyers as a profession. At the most basic level, lawsuits and enforcement actions in the United States require the hiring of U.S. lawyers. The remaining effects break down to some extent between plaintiff-side and defendant-side lawyers,[197] but there is one point where the incentive structures converge: having *at least* some degree of extraterritorial application of U.S. law. As explained further below, plaintiff-side lawyers are likely

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195. *See* Brief of Amicus Curiae of the Ministry of Commerce of China in Support of Defendants' Motion to Dismiss the Complaint at 5, In re Vitamin C Antitrust Litig., No. 06-MD-1738, 2011 WL 197583 (E.D.N.Y. Jan. 20, 2011) (asserting that an alleged cartel was "a regulatory pricing regime mandated by the government of China—a regime instituted to ensure orderly markets during China's transition to a market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes").

196. While some antitrust cases are brought by consumers, others are brought by competitors of the alleged cartel or monopolist.

197. It is, of course, an oversimplification to divide the legal profession simply into plaintiff-side and defendant-side work. Many lawyers do both types of work, depending on the specific needs of their clients of time. However, there is enough of a general division in the profession to make this rough distinction useful for analytical purposes.

to favor extraterritorial rules, while defendant-side lawyers are likely to favor potentially extraterritorial standards, but both should be able to agree that some degree of extraterritoriality benefits their financial interests.

One initial division is that plaintiff-side lawyers benefit when a statute either contains an explicit private right of action or, if ambiguous, is judicially interpreted to contain an implied private right of action. Under current judicial interpretations, this means the plaintiff-side lawyers can benefit from the existence of the Sherman Act,[198] § 10(b) the Securities Exchange Act of 1934,[199] the Racketeer-Influenced and Corrupt Organizations Act,[200] and the Lanham Act.[201] They cannot, however, derive a direct financial benefit from publicly enforced statutes such as the FCPA. For each of these statutes, plaintiff-side lawyers as a class will prefer extraterritorial rules over potentially extraterritorial standards (and, of course, territorially limited rules). This is because a statute structured as an extraterritorial rule will increase (often substantially) the expected value of a plaintiff's claim.[202]

The expected value is higher with an extraterritorial rule than a potentially extraterritorial standard for two reasons. The likelihood of recovery is higher with an extraterritorial rule because there is little or no uncertainty that the statute will be applicable abroad.[203] The costs of litigation are also lower with an extraterritorial rule than with a potentially extraterritorial standard because standards are fact-intensive to litigate and often require substantial discovery before an initial determination as to the applicability of the relevant law can be made. A plaintiff-side lawyer who takes cases on contingent fees directly bears these additional discovery costs. They are entirely unrecoverable if the case is lost, whether by dismissal, summary judgment, or after a trial. Under the American Rule on attorney's fees, the vast majority of these discovery costs remain unrecoverable even in the case of trial victory.[204] Accordingly, a statute structured as a potentially extraterritorial standard will produce fewer cases that are financially viable for plaintiff-side lawyers than a similar statute structured as an extraterritorial rule.

By contrast, defendant-side lawyers face a differing set of incentives. First, defendant-side lawyers as a class benefit from

198. 15 U.S.C. §§ 1–7 (2006).

199. 15 U.S.C. § 78(j) (2006).

200. 18 U.S.C. § 1964(c) (2006).

201. 15 U.S.C. § 1051 (2006).

202. On calculating the expected value of a case, see ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 20–29 (2003).

203. Of course, this would not be the case if the rule is nonfavorable to the plaintiff.

204. Though they may, of course, be recouped out of the proceeds of a settlement or an attorney's share of a court verdict.

extraterritorial statutes whether or not they contain a private right of action. A defendant-side lawyer is needed whether the government or a private party brings an enforcement action.[205]

Second, defendant-side lawyers strongly favor a potentially extraterritorial standard over an extraterritorial rule (and over a territorially limited rule). [206] The cost structure of discovery dramatically differs for a defendant-side lawyer than for a plaintiff-side lawyer. For a defendant-side lawyer working under the traditional hourly fee arrangement, discovery costs are revenue, pure and simple. The more discovery is necessary in a case, the more the defendant's lawyer earns.

These considerations suggest that lawyers, as a class, are likely to favor some degree of extraterritorial regulation. Measured against no regulation of the relevant field, extraterritorial regulation (through civil lawsuits or public enforcement actions) creates clients who would not otherwise need to hire lawyers. Measured against regulation of an activity by the country in which it takes place, extraterritorial regulation by the U.S. government means that clients will need to hire U.S. lawyers rather than foreign lawyers.

F. *Rules, Standards, and International Economic Policy*

A general policy to treat the extraterritorial scope of federal statutes as standards rather than rules is not an indefensible view of international economic policy.[207] Standards can permit the courts to allow extraterritorial applications for cases in which it seems appropriate and curtail them for those situations in which it does not. They can permit broader extraterritorial scope for enforcement actions brought by the government than for enforcement actions brought by private parties. And they can provide a degree of uncertainty for both parties that encourages settlement rather than protracted litigation. Of course, the use of standards to permit courts to resolve cases based on their individual facts presents the concern that all standards raise—that consideration of individual circumstances results in like cases not being treated alike.

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205. Of course, clients will often choose different lawyers for government enforcement actions in private civil litigation.

206. To the extent defendant-side lawyers are hired to lobby for a territorially limited rule, this creates a natural principal–agent problem. With a territorially limited rule, the services of defendant-side lawyers and firms are no longer needed in the relevant situation.

207. This is the view that Kenneth Dam appears to advocate for antitrust law, first as Deputy Secretary of State in the Reagan Administration, and later after returning to academic life. Dam, *supra* note 151, at 376; Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 293 (1993).

Yet rules also raise problems in the extraterritoriality context that would not be unreasonable for institutional actors to consider. First, the question of whether a dispute between a U.S. company and a Chinese or Russian company is a "like case" to an otherwise similar dispute between a U.S. company and a company in a small, developing country does not have an obvious answer. It is a question that may implicate views of both political theory and power politics. Second, rules provide a focal point for foreign interest groups who favor or oppose the extraterritorial application of U.S. law. Each time the Supreme Court grants certiorari in an extraterritoriality case (each of which can potentially announce a rule), numerous foreign governments file amicus briefs[208] and likely also engage in more informal efforts to influence the executive branch's position. Unlike rules, standards neither preclude courts from considering geopolitical ramifications nor provide the same focal point for interest-group opposition. These problems may help to explain the persistence of standards in extraterritoriality decision making, despite the frustrating lack of guidance they provide to private actors about the specifics of their legal obligations.

VII. STABILITY AND UNCERTAINTY

This Part discusses two analytical issues that arise from the preceding analysis. Part VII.A suggests that the three types of interpretive methods used for potentially extraterritorial standards may have different levels of stability over time. Part VII.B explains that uncertainty may have underappreciated value in extraterritorial regulation, making it possible to do things with potentially extraterritorial standards that cannot be done with extraterritorial rules.

A. *Stability: Interpretive Methods*

Proextraterritoriality interpretive methods are likely to be less stable (or less consistently applied) than antiextraterritoriality or territorially neutral interpretive methods. This occurs because proextraterritoriality methods face two practical problems. First, they motivate foreign interest groups to become involved in lobbying (either Congress or the executive directly, or the courts through

208. *Cf.* Ralf Michaels, Empagran's *Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 533, 536 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (noting that seven foreign governments filed amicus briefs at the Supreme Court level in the *Empagran* case).

amicus briefs and law-reform efforts) against U.S. interference with foreign regulatory systems. Second, they are perceived as vulnerable to the criticism that judicial implementation of antiextraterritoriality clear statement requirements—as was done in the Supreme Court's 1991 *Aramco* and 2010 *Morrison* decisions—can remove the courts from making decisions about the territorial scope of U.S. law.

There is some reason to think that antiextraterritoriality interpretive methods may be more stable, over the long term, than proextraterritoriality interpretive methods. Interest groups affected by extraterritorial enforcement actions are likely to consist of several components: those directly affected; those similarly situated who believe they could be affected by a similar, future action; those foreign interests who are opposed more generally to extraterritorial regulation; and those domestic interests who are opposed more generally to extraterritorial regulation (perhaps for fear of similar action by other states).

By contrast, proextraterritoriality interpretive methods may be supported by a more limited set of interests groups. These can include domestic interests benefitted by the extraterritorial action, foreign interests benefitted by the relevant extraterritorial action, those domestic interests in favor of a world-policeman type of role, and those foreign interests that doubt their own government's ability to achieve the regulatory objective (e.g., citizens of corrupt states on bribery issues).

The stability of extraterritorial regulatory programs may also depend on the size of the regulating states. Extraterritorial regulation is both financially and geopolitically costly, and a state's ability to enforce a particular extraterritorial regulation may depend significantly on the importance its market or territory holds for foreign states, businesses, or civil society. The United States and the European Union can both exercise significant extraterritorial antitrust authority because their markets are too important for many companies to avoid. Because the effectiveness of extraterritorial regulation depends substantially on the threat of territorial or market exclusion, smaller, less financially or geopolitically significant states should have more trouble maintaining stable extraterritorial regulatory programs.

This does not, of course, prevent a small state from engaging in extraterritorial regulatory efforts in one-of-a-kind situations sufficiently important to the small state. For example, the young state of Israel succeeded in abducting Adolf Eichmann from Argentina and prosecuting him for acts taken in Germany before

Israel became a state.[209] Similarly, a medium power such as France was able to sink a Greenpeace vessel at harbor in New Zealand before a planned protest of French nuclear testing.[210] While both states faced international ramifications for their actions, they each succeeded in accomplishing what was (at least at the time) apparently an objective of their governments.[211]

B. *Uncertainty as a Regulatory Tool*

Should government regulators be troubled by the natural push toward standards in extraterritoriality decision making? That depends on their regulatory objectives. While there are certainly costs associated with uncertainty, from an individual institutional actor's perspective, there are reasons to think that the benefits could at times exceed the costs. Specifically, the uncertainty associated with standards does two things that are difficult to do in a rule-based enforcement structure. First, it provides a mechanism for self-calibration of enforcement levels, especially when a private right of action exists. Second, it provides a way of discouraging the most egregious of the activities targeted by the statute—even when an actual enforcement action would be likely to cause significant foreign-affairs problems.

1. Self-Adjusting Enforcement Levels

In statutory schemes with a private right of action, the executive does not have the ability to control enforcement levels in the way that it does in a statutory scheme that is enforced only by the government. In this type of statutory scheme, standards may provide necessary flexibility in an otherwise rigid system.

In purely domestic regulatory schemes, this pattern is natural enough. A legal standard such as the reasonable care standard in tort law has the advantage of automatically updating, at least to some degree, as society and technology changes. In the jury system, jury members charged with applying the relevant standard will rely on their own experiences to determine what level of care is reasonable.

In situations involving extraterritorial regulation, the question of whether U.S. law applies extraterritorially in a particular fact situation is typically treated as a question of law for the court.

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209. *See* S.C. Res. 138, U.N. Doc. S/RES/138 (June 23, 1960) (requesting that Israel pay Argentina reparations for Israel's abduction of Adolf Eichmann from Argentinean territory).

210. Rainbow Warrior (Fr. v. N.Z.), 82 I.L.R. 499 (Fr. N.Z. Arb. 1990).

211. To be clear, this is intended as a detached observation on the realities of quasi-military international "regulatory" efforts—not as a comment on desirability of the regulatory methods employed.

Accordingly, it is the court rather than the jury doing the balancing when a statute is structured as a potentially extraterritorial standard. In this situation, the legislature's decision to leave the territorial scope of the statute as a standard is effectively a delegation of authority to the courts.[212] The court, taking account of numerous different factors—including, according to some formulations of the test, extremely broad factors such as "the importance of the regulation to the international political, legal, or economic system"[213]—can reach a decision as to whether the law applies extraterritorially in the particular fact situation presented.[214]

2. Discouraging Egregious Violations

The uncertainty inherent in standards may also serve as a way of calibrating enforcement to the egregiousness of the potential violation. As John Calfee and Richard Craswell have observed, uncertainty in substantive legal standards should have predictable effects on regulated parties' compliance decisions.[215]

With most regulatory requirements, there is some inherent uncertainty about whether noncompliant conduct will be noticed, whether enforcement proceedings will be brought, and whether the

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212. This does not quite seem to be a lawmaking authority (this is probably why it has not been found to run afoul of the nondelegation doctrine); it seems instead closer to law-application authority tied to the specific facts of the case before the court. In understanding this distinction between lawmaking and law-application authority, it is important to remember the type of standard that is involved in decisions as to a statute's territorial scope. These are typically complex, multifactor balancing tests where the individual factors are assigned no level of priority and do not exhaust the set of factors that can permissibly be considered by the court. In reaching decisions under these tests, courts do sometimes make forward-looking statements that could appear to set out the "law" and suggest fact situations that would test the future. However, the very nature of these multifactor tests means that even a single factual change, if sufficiently important, can change the outcome of the test.

213. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 403(e) (1987).

214. This seems to be part of the attraction of balancing to the Reagan-era State Department. *See* Dam, *supra* note 151, at 376. In an April 1983 speech to the American Society of International Law, then-Deputy Secretary of State Kenneth Dam indicated:

> We in the Department of State are not altogether satisfied with making a balancing test the prerequisite to the existence of jurisdiction. As a practical matter, however, a careful weighing of the interests of the states concerned is obviously a useful procedure and a deterrent to unwarranted conflicts. We welcome the Federal courts' use of a general balancing analysis in private cases like *Timberlane*, *Mannington Mills*, and *Mitsui*. Balancing can certainly help to ensure that decisions affecting significant foreign concerns are not taken lightly.

Id.

215. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984).

proceeding will be successful. When the underlying substantive requirement is structured as a standard rather than a rule, there is an additional level of uncertainty tied to what level of conduct is necessary to comply with the law.[216] Under a standard, compliance may not be a yes/no decision. Instead, it may be a decision as to how far one should go along a spectrum that gradually shifts from definite (but costly) compliance to definite noncompliance, with numerous gray areas in between. The exact borderline may be unclear and dependent in part on the identity of the court (or other decision maker) that is later tasked with determining ex post whether past actions were legal.

Assuming the potential defendants are sophisticated and advised by counsel (an assumption that is likely fair in the antitrust or securities fraud context), they should be expected to modify their ex ante behavior in response to litigation risk. [217] This expected modification of behavior intersects in an interesting manner with the Craswell and Calfee model of uncertainty's effects on compliance incentives.

The Craswell and Calfee model demonstrates that, at least in certain situations, uncertainty as to the standard of care legally required can induce regulated parties to under- or over-comply.[218] While Craswell and Calfee are interested in under- and over-compliance with respect to the socially optimal level, the interest here is not in the socially optimal level, but the level of compliance that the regulating state prefers. To the extent the state, such as the United States, has a relatively high level of regulation in a particular substantive area, it may in fact prefer to overregulate foreign competitors of its companies.[219]

This reduced concern about overregulation may also increase the value of standards as a regulatory mechanism. Recall from the earlier discussion that rule-like regulatory actions and executive branch enforcement decisions can serve as focal points for opposition by foreign interest groups.[220] Moreover, executive branch enforcement decisions are costly and require the government to divert resources from other enforcement efforts. The outcomes of these actions are also

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216. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 965 ("Where the law is deliberately unclear, a corporation cannot know whether it must [comply with a particular legal requirement] until a court rules.").

217. On the role of potential liability in influencing expected behavior, see generally Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984) (demonstrating that private liability and government enforcement can have a similar effect on ex ante behavior).

218. Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Sanctions*, 2 J.L. ECON. & ORG. 279, 283–85 (1986).

219. *See* Muchmore, *supra* note 146, at 385–89.

220. *See supra* Part V.C.

more uncertain than in many domestic enforcement actions. There is an ever-present risk that a decision to pursue enforcement in a relatively weak case can result in a precedent that could make it more difficult for the government to pursue similar enforcement actions in the future.

VIII. CONCLUSION

This Article has drawn on the jurisprudential dichotomy between rules and standards as options for structuring legal requirements. After surveying the existing literature, the Article suggested that existing statutes can be better understood as falling into three categories: extraterritorial rules, territorially limited rules, and potentially extraterritorial standards. For the two, opposing varieties of rule-like statutes, interpretive theories are largely irrelevant in determining territorial scope. However, for statutes structured as potentially extraterritorial standards, the choice of statutory interpretation method has a strong influence on whether the court applies the statute extraterritorially in a particular fact situation.

The Article then examined the puzzling persistence of standards in the face of the desire for certain, predictable legal rules in international business. It suggested that numerous parties involved in the extraterritorial law-making process have reasons to prefer that the territorial scope of extraterritorial statutes be structured as standards. This could either be their first preference or a second-best option when a favorable rule is not feasible. These incentive structures suggest that standards may be part of the long-term structure of an extraterritorial regulatory system, especially one that incorporates private enforcement provisions.

Finally, the Article suggested that uncertainty about territorial scope may have some underappreciated benefits—at least from the perspective of the regulating state. It may provide a way of roughly calibrating enforcement levels over time. Moreover, it may make it possible to affect primary behavior in foreign countries even in cases when an actual enforcement action is unlikely to be brought.